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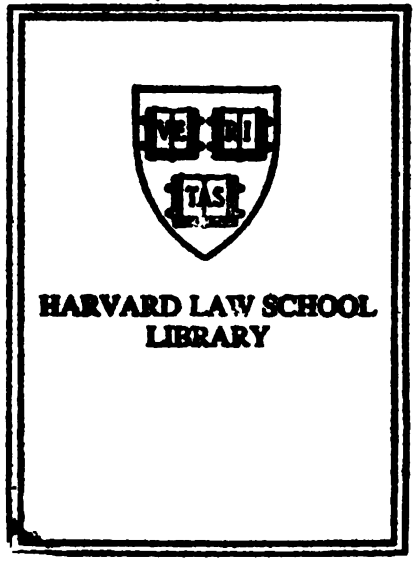
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OF CASES

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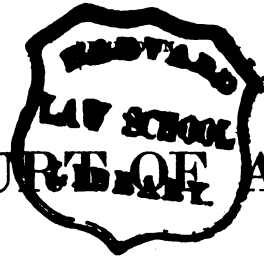

THE COURT OF APPEALS

OF KENTUCKY.

BY BEN. MONROE,
REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOL. X.

CONTAINING THE CASES DECIDED AT THE WINTER TERM, 1849, AND SUMMER TERM, 1850.

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JUDGES OF THE COURT OF APPEALS.

The Hon. THOMAS A. MARSHALL, *Chief Justice of Kentucky.*

The Hon. JAMES SIMPSON, } *Judges.*
The Hon. ASHER W. GRAHAM, }

☞The cases reported in this volume were selected by the Judges, under an Act of Assembly which directs that they shall permit the publication (under State patronage) of such cases only, as, in their opinion, "establish some new, or settle some doubtful point, or be otherwise by them deemed important to be reported."

JUDGES OF THE GENERAL COURT,

Specially required by statute to attend at every Term and hold the Court:
JOHN L. BRIDGES,
All the other Circuit Judges are, also, members of the Court, but their attendance is not enforced. One Judge will constitute a Court.

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OF THE

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AT THE TIME OF THE PUBLICATION OF THIS VOLUME.

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ELISHA A. MACURDY, REGISTER.

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DECISIONS

OF THE

COURT OF APPEALS

OF KENTUCKY.

WINTER TERM....1849.

Marshall's heirs *vs* Porter.

WILL CASE.

ERROR TO THE FLOYD CIRCUIT.

Case 1.

Will case in Chancery.

JUDGE SIMPSON delivered the opinion of the Court.

December 4.

Case stated.

JOHN MARSHALL, in 1820, made and published a will, whereby he gave to his wife, Elizabeth Marshall, all his estate, both real and personal, during her life; and after her death it was to belong to Anna Porter, the wife of Samuel Porter. He subsequently acquired a slave, and a tract of land upon which he resided at the time of his death. He died in 1845, having never either revoked or republished his will. His wife died a few days after her husband.

The question or decision.

The County Court of Floyd, that being the county in which the testator resided at the time of his death, having established the will and admitted it to record, this suit in chancery was instituted by part of the heirs of John Marshall, for the purpose of contesting the validity of the will, and if they failed in that object, then to have a division of the property that the testator had acquired after its publication, which, they contended, did not pass, by it, to Anna Porter the devisee.

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MARSHALL'S H'S vs PORTER.

A jury having found in favor of the will, on an issue made involving all the questions relating to its validity, and no new trial having been moved for, or bill of exceptions filed exhibiting the testimony used on the trial of the issue, the only point that can now be considered, is in reference to the complainants' right to a part of the subsequently acquired property of the testator.

As respects personal property a will is to be construed as speaking at the death of the testator, and a bequest of all the testator's personal estate passes, as well slaves which he possessed at his death as those which he owned at the publication of the will.

As to personal property, a will is construed as speaking at the time of the testator's death, and a general bequest of all the testator's personal estate, embraces not only the personal estate owned by him at the time of the publication of the will, but all that he may own at the time of his death. Prior to the statute of 1800, (2 *Stat. Law*, 1546,) a similar construction was given to a will, as to slaves; and that statute, as has been determined, does not affect the construction, as to what slaves should pass by the will, but only prescribes the mode of passing such as the will should be construed as embracing: *Walton's heirs* vs *Walton's executors* (7 *J. J. Marshall* 58). This court has frequently decided that slaves will pass by a general bequest of all the testator's personal estate. Although, therefore, the testator has not named slaves in his will, yet the language used, being "all his personal estate," is sufficient to pass, not only the slaves, if any, owned by him at the time the will was made, but all that he owned at the time of his death.

But as to land, a different rule of construction prevails. A will is not considered as speaking at any other time than that of its publication; unless the contrary appears, according to a fair and rational interpretation of its language and provisions, to have been the testator's actual intention. The mere fact that he has made, by his will, a general disposition of his land, or of all his estate, will not authorize such a deduction. But his intention to devise whatever interests in land he may own at his death, must be disclosed by the language used, or by the actual import of the provisions contained in the will: *Warner's executors* vs *Swearin-*

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gen and wife, (6 *Dana* 195.) *Dennis et al* vs *Warder*, (3 *B. Monroe* 173.)

A devise of all the testator's lands is to be construed as embracing only such lands as the testator owned at the publication of the will, unless a different intention is clearly expressed or necessarily implied.

In this will, the testator simply devised all his real and personal estate to his wife during her life, and after her death to Anna Porter, the wife of Samuel Porter. In this devise, according to the established doctrine, the testator contemplated only such interests in land as he owned when be published his will. There is nothing in the will which indicates a different intention. The testator declared his purpose to dispose, by will, of such "worldly estate as it hath pleased the Almighty to bless him with." No intention is manifested by any thing contained in the will, to extend that purpose, so far as land was concerned, to any that he might subsequently acquire. It follows, therefore, that the land owned by the testator at the time of his death, and which he did not own at the time of the publication of his will, did not pass by it, but descended to his heirs at law.

The chancellor may decree partition of lands descended.

The complainants were, as part of the heirs at law of the testator, entitled to a partition of the landed estate belonging to him, which hid not pass by his will. As this relief was claimed in the original bill, in the event that the will was established, there is not only no impropriety in decreeing it to the complainants in this case, but they had a right to demand it, as it was one of the objects of the suit, properly presented in the pleadings. The decree, therefore, dismissing the complainants' bill was erroneous.

Wherefore, said decree is reversed, and cause remanded for a decree and further proceedings consistent with this opinion.

Apperson for plaintiffs; *J. & W. L. Harlan* for defendants.

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REPLEVIN.

Cass 2.

Field *vs* Deatley.

ERROR TO THE BATH CIRCUIT.

Instructions. Practice.

December 5. JUDGE GRAHAM delivered the opinion of the Court.

The case stated. FIELD having an execution against the estate of Deatley, caused it to be levied on certain slaves in the possession of Jemima Deatley, who claiming the slaves to be her property and not subject to the levy of the execution, instituted this action of replevin for them. The proof is that Washington Deatly and Griggs were largely indebted to Field; Clarke and Powell were Deatley's sureties. To indemnify them as such, he mortgaged to them the slaves in contest. Whether at the time of the mortgage the slaves were claimed to be his property, or that of his mother, does not clearly appear; but from his statement that he supposed his mother knew of the mortgage, and did not object to it, it may be inferred they were hers, or at least claimed by her. After the mortgage, W. Deatley, who states that he was in debt to his mother $300, did, at her request, advance said sum of money to purchase the negroes for the mother. The money was placed in the hands of Prather, who made the purchase of the slaves of the mortgagees for Mrs. Deatley, and the negroes remained in her possession from that time, some six or seven years since, up to the time of the levy. Two hundred and fifty dollars of this money was appropriated to paying that much of the debt due to Field from Deatley and Griggs, and Field received the money knowing it had been received for the sale of the negroes. We deem it unnecessary to detail all the evidence, inasmuch as that already mentioned is sufficient to test the propriety of the third instruction given by the Court to the jury. That instruction is, "that if the jury believed that the money which Prather paid for said negroes went to the

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payment so far of the debt of Field against Deatley and Griggs, then Field was estopped to deny the validity of the sale from Clark to Mrs. Deatley, provided Field knew the money which he was receiving, was received of Mrs. Deatley on the sale of said negroes."

We do not concur in that conclusion. If the slaves were in fact the property of Washington Deatley, or if the purchase was made by his mother for him, or were held by her in secret trust for him thereby to avoid the payment of his debts, or hinder and delay his creditor in the collection of his debt, then the creditor should be permitted to treat the slaves as his debtor's property, and cannot be estopped from so doing by a knowledge of the fact that the money was received from Mrs. Deatley. It may be that the facts proved would have authorised the jury to find for the plaintiff without that instruction; but as that is not certain, and as the instruction given, withdrew from the jury the question of the right of property, we think the Court erred in giving it, and ought to have granted a new trial as moved for by the defendant.

Though the facts proved may have been sufficient to sustain the finding of the jury, yet if the Court erred in instructions bearing upon the point in issue the verdict should be set aside.

The judgment of the Circuit Court is therefore reversed and the cause remanded with directions to set aside the verdict and judgment, and to award to the defendant Field a new trial of the case without payment of costs.

Daniel & Sudduth for plaintiff; *Apperson* for defendant.

Adams *vs* Hammon.

ERROR TO THE MORGAN CIRCUIT.

Jurisdiction. Awards.

CHANCERY.

Case 3.

JUDGE GRAHAM delivered the opinion of the Court.

December 5.

THE complainant Hammon, by his bill in Chancery, charges "that he sold to the defendant Adams a mill-seat on Licking river and a small piece of land on both

Case stated.

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ADAMS vs HAMMON.

sides of said river, opposite the mill-seat, on which to abut his dam and build a mill-house; that by the terms of the contract, Adams was to build a water grist and saw mill; he was to grind Hammon's grain toll free, and was to saw all the lumber, which the complainant wished to use, free of any charge. This was the only consideration for the mill-seat and land." The bill further charges that after Adams had completed the grist mill, he was, by reason of his poverty, unable to complete the saw mill; that for the purpose of "enabling himself to complete said mills and render full consideration for the mill-seat and land and to perfect in himself the title, he proposed to complainant to become an equal partner with him in the saw mill in expenses and profits. On these terms a partnership was formed between the parties." That, at their equal expense, the mill was put in operation, and that he *then* conveyed the mill-seat to Adams and took from him, a writing, by which it is shown "that he was to have one half of the water tide for sawing;" that the mill was profitable for some time to both parties, and until Adams "arrogated to himself the exclusive control of the mill, and would not suffer complainant to repair or use the mill, and gives it out in speeches that he intends to let said mills go to ruin, and build another on the opposite shore," and thereby rid himself of his obligations to complainant. The bill further charges, that to the extent of the saw mill, he is a full partner of said Adams, and as to its apendants, the seat, &c., he is a joint tenant with him—Adams holding the legal title as trustee for him. The prayer of the bill is for an order restraining Adams from building a mill on the opposite shore and for a specific execution of the contract; for a dissolution of the partnership; for a sale of the property and division of the proceeds, &c.

The defendant in his answer admits in substance the first contract set forth in the bill as to sawing and grinding. As to the alleged partnership he states that almost every thing had been done in relation to the erection of the saw mill, except the irons, &c.; and it was agreed

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that each partner was to be at equal expenses in the purchase of the necessary machinery; to bestow an equal amount of labor, and to have equal use of the saw mill—that is, that each was to saw alternately 100 feet of lumber. They were to use the mill separately, not jointly. He admits that Hammon did an equal portion of labor, but denies that he contributed an equal portion of expenses; and says that the partnership, in fact, embraced only the use of the saw, and did not include the mill house, seat and fixtures. He alleges that hitherto he has fully complied with all his undertakings with complainant, and yet is willing to do so. He admits that he is about erecting another mill, and insists upon his right to do so. He resists the prayer in complainant's bill. After the filing of this answer, and without taking any proof, the parties at the May term, 1848, submitted their cause to three arbitrators, and agreed on the record that their award should be the decree of the Court. The arbitrators forthwith returned their award, which was, by the Court, immediately approved and ordered to record. The award states that the arbitrators met on the 29th February, 1848, and were then sworn, &c.

The award and decree.

We do not clearly perceive how it was that these gentlemen met as arbitrators nearly three months before the order was made appointing them to that office. We suppose, however, that the parties had in vacation made the appointment, and that the action of the Court was merely in confirmation of that previous act of the parties. Their award is drawn up in the manner of a decree. It forever restrains Adams from erecting the mills on the opposite side of Licking river; it decrees that he shall grind the complainant's grain for his family use, at all times hereafter toll free, unless prevented from doing so by unavoidable accidents; it also decrees that the complainant and defendant are equal partners in the saw mill and in one undivided fourth part of the six acres of land; it dissolves the partnership, and directs that in low water the grist mill shall have the preference of the tide; and then decrees that the saw

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ADAMS vs HAMMON.

mill and an undivided fourth part of the six acres of land be sold on a credit of twelve months, appoints the commissioner and makes him an allowance for his ser-services, and directs the proceeds of the sale to be equally divided between the parties, and specifies what portion of the expenses of keeping up and maintaining the dam and abutment shall be borne by the parties and their successors. At the August term, 1848, the commissioner reported a sale and conveyance to the complainant Hammon.

At the May term, 1849, the Court confirmed all these acts of the commissioner and awarded a writ of *habere facias possessionem.*

It is error to act upon an award returned into Court at the same term when the parties have not been furnished with copies as the statute requires.

By the foregoing statement, it will be seen that the arbitrators, in their award, acted upon some matters not embraced in the controversy of the parties as set forth in bill and answer, and that they have made the complainant a partner in the saw mill, and in the land around it, when the complainant himself has not averred that the partnership was so extensive. The agreement in writing between the parties, which should have been previously noticed in this opinion, is dated some days after the date of the deed from Hammon to Adams, and in that instrument Adams undertakes to grind Hammon's grain for family use toll free, as long as said mill keeps in operation. The award does not limit the obligation to grind by the operation of the mill, but by unavoidable accidents. The agreement stipulates that Hammon is to have the one half the benefit of the sawing tide time, so long as the mill remains in operation. The defendant denies that Hammon was entitled to any further benefit or privilege, and there is no other proof in the cause. But whatever objections there may be to the award, it was the duty of Adams to have taken exceptions to it in the Circuit Court, if he had opportunity to do so, and if he failed to object when he might have been heard, he should not now be permitted to complain. We are constrained to say that no such opportunity appears to have been given. The award was returned immediately upon the appointment of the ar-

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bitrators, and was forthwith sanctioned and approved by the Court.

There is nothing in the record to show that Adams had any reason to suppose that the award would be immediately returned into Court, or that the Court would forthwith approve of it, and order it to be recorded. Nor is there any evidence that he had ever seen it or been furnished with a copy of it, or waived his right to have one. "It is erroneous to render judgment on an award at the return term, unless the party objecting to it had been furnished with a copy of it, or waived objection to the omission to give him a copy:" (4 *J. J. Marshall*, 227.) "The law secures to each party the right to a copy of the award fifteen days before it shall be entered as the judgment of the Court:" (2 *Bibb*, 159.) When a copy has not been delivered, the judgment of the Court should be postponed until the next term: as thereby giving the party that time to avail himself of any objections to the award, would completely afford him the benefit the law intended, by requiring the delivery of a copy: (2 *Bibb*, 162.)

Can a covenant to grind the grain of another be specifically decreed? *Quere.*

We deem it very questionable, to say the least of it, whether Hammon's remedy against Adams for refusing to grind or saw for him, or for negligently or wilfully not keeping his mill in order, (if in fact he has so failed,) is not at law exclusively. Circumstances may, however, exist which would render it proper for the Court to decree a specific execution of the agreement between these parties. So far as the facts are presented in this record, there is nothing to authorize the order or decree forbidding Adams to erect the additional mill; but as the case may assume a very different aspect after the cause is returned to the Circuit Court, we deem it proper at present only to determine, that the Court erred in acting on the award so speedily, and that time should be afforded each party to take exceptions to it; and if the exceptions shall be in whole or in part sustained, then that such other proceedings be had in the premises as the equity of the case requires.

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SHORT vs BRYANT.

Wherefore, the decree of the Circuit Court is reversed, and the cause is remanded, with directions for other and further proceedings, in accordance with this opinion.

Hazlerigg for plaintiff; *Apperson* for defendant.

SCI. FA. *Case* 4.

Short *vs* Bryant.

ERROR TO THE LINCOLN CIRCUIT.

Lapse of time. Sureties.

December 6. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

SHORT and one Withers having executed a note to Bryant for about $120, a suit was afterwards brought against them on the note, and Withers having pleaded infancy, a verdict and judgment were rendered for him on that plea; and a judgment for the debt &c. was rendered against Short alone. After the lapse of more than seven years from the date of this judgment, without execution thereon, Bryant sued out a *scire facias* to have execution against Short, to which the latter pleaded that he was surety on the note, and relied on the lapse of seven years without execution on the judgment as constituting a bar to its enforcement, by virtue of the act of 1838, limiting actions against sureties, (3 *Stat Law*, 558.) The replication to this plea sets forth the plea of infancy by Withers, the verdict and judgment in his discharge, and the judgment against Short alone, and concludes, "without this, that the defendant is surety merely," &c. A demurrer to this replication was sustained, and a judgment in bar rendered against the plaintiff, who brings the case to this Court for revision.

When the principal is discharged from liability on the ground of his infancy and judgment is rendered against the surety, the failure to sue out execution for

The only question presented is, whether, under the circumstances stated in the replication, the defendant is to be regarded as a surety within the purview of the first section of the act referred to, which discharges sureties from liability on judgments when seven years shall have elapsed without execution on the judgment. It is, indeed, contended that the traverse at the end of

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more than seven years does not operate to discharge the defendant in the judgment.

the replication denies the suretyship in the original note, as alleged in the plea, and that on this ground, if there were no other, the replication should be deemed a sufficient answer to the plea. We think, however, the traverse referred to should rather be considered as relating to the previous matter of the replication, and as denying, not that the defendant was surety originally, but that he is surety after the discharge of the alleged principal on the plea of infancy. And, therefore, as we have said, the only question is, whether he is to be so regarded in view of the statute.

This question is certainly not free from doubt or difficulty. But as the judgment in favor of the infant and against Short, is a conclusive discharge of the former, and made the latter the sole debtor, cutting off all relation between him and the other party, and all remedy, either at law or in equity, against the alleged principal, either in behalf of the creditor or of Short himself, we are of opinion that whatever may have been his real or apparent attitude in the original note, he could no longer be regarded as a surety, when there ceased to be a principal, bound as such, either in law or equity. The debt became, by the judgment, absolutely his sole debt; not merely because the judgment against him alone might operate to merge the original contract, and, in effect, to terminate the legal liability of the other party; for if that were all, it might still leave him bound in equity to the creditor, and liable both at law and in equity to his co-obligor, but because it determined, absolutely and conclusively, all of these liabilities, and puts an end to all rights and interests pertaining to the character of surety.

Short's liability on the judgment was not as surety in the judgment, nor in the original note, but as the only person ever bound by the note; he, therefore, does not come within the fair interpretation of the terms of the statute, and as he had no rights against the original co-party which might be affected by the conduct of the creditor in the enforcement of the judgment, he does not come within the reason or principle on which the

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RICHARDSON vs SCOBEE.

statute makes the delay of execution a discharge of the surety: *Davis* vs *Womach, &c.*, (8 *B. Monroe.*)

The delay which has occurred, has operated solely for the benefit of Short, and cannot have injured him in regard to any rights or remedy which he had, or can be presumed to have had, against Withers, growing out of their original relation, because there was no such right or remedy either in law or equity.

Wherefore, the replication is deemed sufficient, and the judgment on the demurrer is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings.

Burton and J. Smith for plaintiff; *Fox* for defendant.

CHANCERY.

Case 5.

Richardson *vs* Scobee.

ERROR TO THE MONTGOMERY CIRCUIT.

Usury.

December 6.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

If a note be prepared without consideration for the purpose of borrowing money merely, and that fact be known to the lender of the money, or under such circumstances as justifies the conclusion that the lender of the money ought to have known that the makers of the note acted in the matter with the view of enabling the payer to raise money upon the note by disposing of it at a discount greater than the legal interest for the time it has to run, the transaction should be

ALTHOUGH it is not expressly proved that Richardson and Millspaugh knew that the note on which they advanced the money was made and endorsed to them, or in blank for the mere purpose of raising money for one of the parties, and without any consideration or real transaction between them, we are of opinion that the circumstances of the case leave little room to doubt that they did know or understand that such was the facts, and that if this were not so, Turpin, through whose agency the transaction was effected, was acting for them, and perhaps for both parties; and it is certain that he knew that the note was made and offered for the mere purpose of borrowing money.

If money dealers may shield the most oppressive and extortionate exactions under the form of an acquisition of notes by assignments, it can only be upon the ground of a real purchase made as such in good faith. If it were sufficient for the transaction to bear the form of an assignment and purchase, nothing would be easier

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than for it to be put into that form in all cases in which the needy applicant had a friend willing to assume the attitude of payee and endorser of his note. Nor would it be less easy to evade the statute, if, in order to fix the character of usury upon the transaction, it were necessary to prove that the party advancing the money for an assigned note, was, in so many words, informed of the real object and nature of the transaction. If he may lawfully purchase at any rate of discount however great, he will of course desire that his advances should be in that form; and if he is not to be affected by the presumptions arising from those characteristics which indicate a loan or borrowing to have been the real intent of the transaction, he may avoid actual knowledge by the failure to enquire into what he well understands, or by the interposition of a third person between himself and the borrower.

regarded as usurious—an attempt to evade the statute.

In this case it appears that there was no direct communication between the parties to the note and Richardson and Millspaugh, who really advanced the money. But George Scobee being in need of money applied to Turpin for a loan, and being told that he had no money to lend, but that if he had a note to sell he could come, a note was afterwards drawn under the direction of Turpin, signed by George Scobee and William Scobee (his surety) and payable to J. Dooley, by whom it was assigned either to Richardson and Millspaugh or in blank. In the mean time Turpin had consulted with Richardson, and after the note was brought to him, signed by George Scobee alone, had required an additional obligor, and being furnished with $430 by Richardson and Millspaugh, handed it to George Scobee and received the note just then executed for $688, payable in twelve months with the agreement, in part, that if George Scobee should make payment at any time after two months, he should be allowed a discount or advance, for the time the note might have to run, at the same rate as that at which the money was advanced on the note, which was five per cent. per month. It is to be assumed that these terms were either fixed on be-

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RICHARDSON vs SCOBEE.

tween Turpin and the parties who advanced the money, and who admit that they knew they were not buying from Turpin himself, or else that they authorized Turpin to arrange the terms of the advance. They do not deny the last feature of those terms, as above stated, and it is to be presumed they knew before they parted with their money on what terms it was to be put out of their control. They allege that they purchased the note from Dooley, and on the faith of his endorsement, knowing his solvency and correctness, and that they did not know who were the makers, of whom it appears that although one was embarrassed the other was good. Then waiving the inference that the name of the surety was added to the note at their suggestion, could they reasonably have supposed that Dooly, a solvent man, was selling this note as his own property at the exorbitant and ruinous discount which was agreed on? Would it not have excited the enquiry from an ordinary man, as to the motive for such a sacrifice? Would not the buyer of a note enquire who were the makers, and what the consideration? Would he not ordinarily like to see the assignor at least, if not the maker, before he invested his money? And, in a country where the office of broker is not common, would he not ask why the vendor of the note, being at hand, did not act for himself? Besides this, the note was, in fact, executed for the purpose and with the intent of borrowing money upon it, and under the direction of the middleman through whom the money was advanced, before the note was finally executed and assigned, and who paid it over as soon as this was done. And if other circumstances were wanting, the agreement that the money might be re-paid within the year on the same terms on which it was advanced, would fix its character as a loan.

If the parties who advanced the money did not, in fact, know that the note was made for the accommodation of one or more of the parties to it, and as a means of borrowing money, their ignorance was wilful and cannot protect them. The transaction was, in our opinion, a mere device to evade the statute of usury, and was,

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essentially, a loan of the most usurious and oppressive character. Under this view of the case, the decree is at least as favorable to Richardson as the facts would allow and he has no right to complain.

The usurious debt having been paid by the Scobees, Dooly had no possible interest in the case, and was a competent witness. The competency of George Scobee, notwithstanding the release of William to whom he has assigned his claim for the usury, being at least doubtful, in the absence of a release from him to Wm. Scobee, we remark that our conclusion would not be affected by the rejection of his deposition.

Wherefore the decree is affirmed.

Apperson for plaintiff; *Peters* for defendant.

Prather *vs* Ross.

PET. & SUM.

ERROR TO THE GARRARD CIRCUIT.

Case 6.

Limitation. Pleading at Law.

JUDGE SIMPSON delivered the opinion of the Court.

December 6.

IN this suit by petition and summons, by Ross against Prather, on a note for sixty dollars, due the 25th day of December, 1839, the defendant filed a plea, alleging that he was the surety of his co-obligor, Thomas Prather, and that more than seven years had elapsed after the plaintiff's cause of action had accrued on the note, before any suit was brought on it. To this plea the plaintiff replied, that when the cause of action accrued on the writing, the defendant resided in the county of Madison, and that he had obstructed the bringing of the suit, by removing from that county prior to the expiration of the seven years. To this replication the defendant demurred, and his demurrer having been overruled, and judgment rendered against him, he has brought the case to this Court.

Case stated.

The only question is, as to the sufficiency of the replication. The act of 1838 (3 *Stat. Law*, 559) under which the plea was filed, provides, "that if any person

A replication to a plea of the statute of limitation of 1838 lim-

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PRATHER vs ROSS.

iting actions against sureties in notes to seven years, which replication averred that the defendant had removed out of the county where the note was given before the expiration of the seven years, and that he had obstructed the bringing of the suit by such removal held to be a good answer to the plea.

or persons, defendant or defendants, to any of the aforesaid actions, shall abscond, or conceal themselves, or by removal out of the country, or the county, where he or they do or shall reside, where such cause of action accrued, or by any other indirect ways or means defeat or obstruct any person or persons, who have title thereto, from bringing and maintaining any of the aforesaid actions, within the respective times limited by this act, that then, and in such case, such defendant or defendants, are not to be admitted to plead this act in bar to any of the aforesaid actions." This proviso is exactly similar to that which is contained in the general limitation act of 1796: (2 *Stat. Law*, 1139.)

The objection made to the replication is, that it is too general and indefinite in its averments—that instead of alleging that the plaintiff was obstructed in the bringing of his suit within the seven years by the removal of the defendant from the county of Madison, it should have set forth, specially, how the removal operated to produce such obstruction.

In the case of *Sneed* vs *Hall*, (2 *Marshall*, 22,) it was decided that a plea of the statute of limitations was not avoided under the proviso contained in the act of 1796, by a replication avering only a removal from the county. But in that case, the intimation is strong, that had it alleged that the plaintiff had been obstructed in the bringing of his suit within the time limited, by such removal, that the replication would have been sufficient.

The replication in this case follows the language of the statute. To require the party to set out the facts more specially, might lead to unnecessary prolixity in pleading. The defendant, by denying that the alleged removal had obstructed the bringing of the suit within the limited time, would have made an issue that would have imposed upon the plaintiff the burthen of establishing the alleged fact—not the removal itself, but the effect produced. We, therefore, regard the replication as containing all that was necessary, and the decision of the Court below, overruling the demurrer to it, as being correct.

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Wherefore, the judgment is affirmed.
Burdett for plaintiff; *Burton* for defendant.

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Cox *vs* Taylor's Administrator.

Case.

Error to the Kenton Circuit.

Case 7.

Limitation. Malicious suit. Injunction bonds Merger.

Chief Justice Marshall delivered the opinion of the Court.

December 7.

Case stated.

This action on the case was brought in 1844, by Cox against Taylor, for the recovery of damages consequent upon suing out and keeping up an injunction, whereby the plaintiff was restrained from the advantageous use of his land from 1831 to 1843. The defendant filed a demurrer to the declaration and also pleaded the general issue and the statute of limitations that he did not commit the wrongs and injuries complained of within five years before the commencement of the suit. To this last plea the plaintiff replied that, though the wrongs and injuries complained of were commenced more than five years before the institution of the suit, they were continued and not fully committed until within five years, &c. The defendant demurred to this replication; and the demurrer to the declaration having been previously overruled, the demurrer to the replication was sustained; and the plaintiff making no other answer to the plea, a judgment in bar was rendered against him, which he seeks to reverse by writ of error.

The *continuance* of an injunction depriving a party of the use of land, through malicious motives and without probable cause may be a ground for action though the action for its wrongful obtention might be barred by lapse of time. *argu.*

If the declaration should be understood as alleging no other wrongful act of the defendant but that of suing out the injunction, and as claiming damages for the injuries consequent upon that act, then as the act complained of was single and not continuous, we should be of opinion that the replication in setting up some other act as the ground of action might be regarded as a departure from the declaration. But if the declaration should be understood as complaining of the wrongful continuation of the injunction as well as of its ori-

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Cox vs Taylor's ad'r.

ginal issuance, then the replication is not a departure, but contains a proper averment showing that a part of the cause of action laid in the declaration accrued within five years. There can be no doubt that although the continued pendency of an injunction may in some sense be regarded as a consequence of its original emanation or procurement, it may in fact be maintained and kept up maliciously and without probable cause, or upon pretexts known to be false, and that if so, the continuation of it, like the original suing out, may be a substantive cause of action, for which there may be a recovery. although the cause of action for suing it out, and the damages immediately consequent thereon, as alleged and claimed in the same suit, may be barred by a plea of the statute of limitations. Whether the declaration does in fact set out the continuation of the injunction in such a manner as to present a distinct cause of action on which the plaintiff might recover, though the action for suing out the injunction were barred, we do not deem it necessary to determine as a distinct question, because, in our opinion, the declaration is fatally defective for the want of those allegations which are necessary to sustain the action either for the issuing or continuing of the injunction.

Mesne profits cannot be recovered for a greater length of time than five years before action brought, nor can it be commenced until possession claimed. *argu.*

Before proceeding to particularize these defects, we will. however, notice an argument which seems to be directed against the effect of the plea, inasmuch as it assumes that as the plaintiff could not sue until the injunction was dissolved, the limitation should not commence running until that time, since, otherwise, the plaintiff might be barred from any recovery. But conceding that this would be true with regard to a recovery in an action on the case, our statute still furnishes a remedy by requiring the party who obtains an injunction restraining another from the enjoyment of his rights of property to execute first a bond securing him against all damages consequent upon the wrongful issuing of the order. This remedy is certainly not barred by the statute, nor by any presumption founded on mere lapse of time during the pendency of the in-

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junction. And even under the restrictions to which it is subject, as explained in the case of *Pettit, &c.* vs *Mercer*, 8 *B. Monroe*, 51, it would seem amply sufficient to cover all damage claimed in this action, if the penalty of the bond be large enough; and if it is not, the plaintiff had it in his power to have enforced the execution of a sufficient bond during the pendency of the injunction. So that in any state of case and at most, the fixing of the time when the statute commences running in an action on the case at the date of the injunction, when that is the wrongful act complained of, would not deprive the party injured of his appropriate remedy for all substantial injuries which may be regarded as affecting his rights of property, and which may be estimated with reasonable accuracy, but will only cut off his remedy for those injuries to character, credit, or feeling, the estimate of which will rest only in the opinions and feelings of a jury. Whatever hardship there might be in applying the statute in this mode, in a case involving an injury to character or credit, there is none in the present case which involves no other injury or damage than such as is covered by the injunction bond. Whether there is ground for discriminating between the cases, we need not now enquire, nor indeed is it necessary to determine in this case when the statute commenced running against the action. And we do not decide the point. We remark, however, that so far as this case is concerned, the effect of the statute in the case of the action for mesne profits, bears considerable analogy to it, since, although the action cannot be commenced until after the possession is regained, the statute, if properly pleaded, bars a recovery for more than five years prior to the commencement of the action for mesne profits, even against a party who may have remained in possession from the institution of the action of ejectment till the execution of the *habere facias possessionem: Doe, &c.* vs *Jones*, (6 *B. Monroe* 489, *and Till. Adams on Ejectment*, 333, *&c.*) And even if there can be no recovery against the plea of the statute for any part of the consequential damages, though arising

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within five years, if the suing out of the injunction before that time be the only wrongful act alleged as the ground of the action, still, as already shown, the declaration might be so framed as to authorize a recovery of the damages consequent upon a continuation of the injunction for five years before the institution of the action therefor, or for any portion of the time within that period. But as already said, this declaration shows no cause of action in case either for the suing out or the continuing of the injunction. The action is essentially for a malicious prosecution, that is, for the groundless institution and prosecution of a suit without probable cause. The common law did not give this action merely on the ground that the former plaintiff may have been unable to establish a claim asserted by suit, although the decision of that suit might conclusively determine the injustice and wrongfulness of his claim. It allowed every man to pursue his claims by the established remedies, subject to no other burthens or penalties, but such as were incident to the remedies themselves in case of failure, unless he had resorted to them, not only without such actual grounds as would ensure success, but without even probable cause or ground for the proceeding, and therefore presumably for the mere purpose of harrassing, or injuring the other party, either in respect to his life, liberty, property, or reputation. And the principle is the same, whether the malicious proceeding be a criminal prosecution or a civil suit. In either case the wrong consists not merely in the falsity and consequent injustice of the charge or claim, but in its being made by legal proceeding without probable cause, and therefore, as the law decides, from malicious motives alone. This want of probable cause being the essential ground of the action, must be alleged and proved in order to sustain it. If there be probable cause, though the charge or claim be false, and therefore unjust or wrongful, the most express malice will not be sufficient. Therefore the allegation that the party had maliciously, or falsely, or unjustly, or wrongfully, instituted the former proceeding will not supply the want of the allegation that

The common law gives an action for bringing a civil suit maliciously and without probable cause.

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he did it without probable cause; which although it need not be stated in these express words, must be stated in some form of substantive averments, or must at least be shown clearly in the declaration. The doctrine and principles establishing these propositions are clearly stated and adopted in the cases of *Maddox* vs *M'Ginnis*, (7 *Monroe*, 370;) *Wood* vs *Weir & Sayre*, (5 *B. Monroe*, 544;) and many other cases in this and other Courts.

A declaration in case for wrongfully sueing out an injunction and depriving the plaintiff of the use of his land without averring that it was obtained and prosecuted maliciously and without probable cause held to be invalid.

The declaration in this case does not allege nor show that the injunction or restraining order, whereby the plaintiff was prevented from the proper use and enjoyment of his land, was obtained or caused to be issued or continued without any probable cause therefor. The allegation that it was obtained for the purpose of harrassing, injuring and oppressing the plaintiff, and of preventing the advantageous or any use of his land, is not equivalent to the averment of want of probable cause, but only to an averment of malicious motive. The allegation that it was unjustly and wrongfully done, does not deny the existence of probable cause, but only of actual or perfect cause, and nothing more is shown by the statement that the injunction was finally discharged and dissolved, which might indeed have been done, though there was ample cause in the first instance, and until just before the dissolution. The declaration does not, therefore, decisively or sufficiently negative the existence of probable cause at any time, and is consequently bad. It is scarcely necessary to remark that these principles apply to the action on the case which is founded on the common law, and not to an action on the bond which was intended to secure the obligee, not from malicious injuries only, but from any injury to his property or his rights of property which might be occasioned by the wrongful resort to the extraordinary remedies in which the bond is required. And as was decided in the case of *Pettit &c.* vs *Mercer*, above referred to, the existence or non-existence of probable cause is immaterial in an action on the bond. It is clear from that case, as well as from what has already been said in

Suit upon an injunction bond may be prosecuted upon an injunction bond after the injunction is dissolved for any violation of its provisions without respect to probable cause which existed for sueing out the injunction.

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ELLIOTT vs TREADWAY.

this, that the action on the case, and that on the bond, are not, as remedies, co-extensive or commensurate, either as to the nature of the wrong or as to the extent or criterion of damages recoverable, and therefore, there is no ground for the argument that the remedy by action on the case is merged in that on the bond. Nor are we prepared to decide that if they were altogether commensurate, or that so far as they are so, the one is merged in the other. In the case of official bonds of Sheriffs, &c., the remedies both exist, and we do not see that the same should not be the case with regard to injuries occasioned by injunctions, &c., for which the party might undoubtedly have an action on the case if no bond were required.

That an injunction bond has been given does not merge any cause of action given by the common law for maliciously sueing without probable cause, any more than does a sheriff's official bond.

The declaration being fatally defective, the Court did not err in sustaining the demurrer to the replication, but should have sustained the demurrer to the declaration.

Wherefore the judgment is affirmed.

Harlan and *J. W. Stevenson* for plaintiff; *Lindsey* for defendant.

TRESPASS.

Case 8.

Elliott *vs* Treadway.

ERROR TO THE MONTGOMEY CIRCUIT.

Public Highways. Dedication.

December 7.

JUDGE GRAHAM delivered the opinion of the Court.

Case stated.

THIS action of trespass was instituted by Elliott to recover of Treadway damages for removing a fence and gate upon his land, and for entering upon his premises. Plea, not guilty, with leave to give in evidence the establishment of a public road or private passway on the land where the supposed trespasses were committed, so far as such evidence may be material. The Clerk states that this plea and leave were filed in open Court, on the 10th September, 1849, and placed on the minute book, but was omitted, by mistake, to be noted upon the order book. On the same day, a jury were

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sworn to try the issue joined. The evidence introduced by the parties establishes the following facts: The road alluded to, has been used by the public as a public highway for more than twenty five years, some of the witnesses say for thirty years. It run from the road leading down the creek Lulbegrud, by the mill occupied by the defendant, to Mt. Nebo meeting house. The Clerk has been unable to find any order of the County Court, establishing the road. At February term, 1834, the Court, regarding it as a public road, appointed Robert Daniel overseer of it, and allotted hands to work it. Orders appointing overseers, were made from time to time, the last one, shown in proof, being dated April, 1842. At January term, 1845, an order, on the motion of W. Shoush, was made discontinuing it as a public road, and establishing a private passway over the same ground. The order states, that notice had been given according to law, of the intended application. It was "further ordered, that if the persons over whose land the road passes shall apply, at the next Court, to have the order set aside, the question of the propriety of discontinuing the road shall be tried as if this order had not been made." The road, or lane, continued open until June, 1849, when the plaintiff, who owned the land on both sides of it, and had a fence on each side, removed the rails, and with them built one fence, in the centre of the lane. He put a fence across the passway next to the mill, and a gate and fence across the passway next to the road, thus closing the road or passway at both ends. After this fence was made, the defendant peaceably removed the fence from the middle of the passway, and across it, and made another fence on one side of the passway, thus exposing the plaintiff's clover field. It was proved by one witness, that Esquire Wells had the road opened over thirty years since, and told witness the people in the neighborhood thought he had an order for opening it, and he held out that idea so as to get them to work in opening it. Some years since, the location of the road was slightly changed by the erection of a bridge.

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ELLIOTT vs TREADWAY.

The jury having found a verdict for the defendant, the plaintiff moved the Court for a new trial, on the alleged grounds of improper finding by the jury, and of improper instructions by the Court. His motion being overruled, he has brought the case to this Court, and now assigns various errors.

The main question of law involved in this controversy is one of considerable interest. Before adverting to it, it is necessary to dispose of the fact, that at the instance of Shoush, the County Court had made an order discontinuing the road as a public road, and establishing it as a private passway.

No road can be discontinued or changed unless a majority of all the Justices of the Peace be present, and a majority of that majority concur. (2 *Dig.* 1409.)

The statute is imperative that no road shall be discontinued unless there are a majority of all the Justices in said county present: (2 *Dig.*, 1403.) No public road shall be changed unless a majority of all the Justices of the Peace in commission, in the county where the road is to be changed, shall sit and compose the Court, and a majority of that majority must concur in the change: (2 *Dig.*, 1409.) It does not appear that there was present a majority of the Justices of the county, when this order was made. To give validity to the order, it must be shown that the Court was so constituted. That order is, therefore, regarded as void, and not entitled to any consideration.

It is also assigned for error, that the plea was not noted on the order book, and, therefore, the jury ought to have been sworn to inquire of damages, and not, as they were, to try the issue.

Where the minute book shows that a plea was filed and issue joined, and the jury be sworn to try the issue, though it be not noticed upon the order book, no objection can be taken after verdict.

The jury were sworn to try the issue; the trial was had upon the merits of the case; a plea is certified by the Clerk as having been actually filed, in open Court, and noted on the minute book; and during the whole trial proceedings were had by each party, as though such plea, with leave to give particular matter in evidence, was on file. We think such an objection ought not to be sustained, after verdict and judgment on the merits. This opinion, we believe, is sustained by former adjudications of this Court: (1 *J. J. Mar.*, 591; *Pr. Dec.*, 225; 4 *B. Monroe*, 200.)

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This brings us to the most important question in the case. Is this road, or passway, one of a character to justify or excuse the defendant for removing the obstructions in it? This question has not been, as we believe, definitely settled by this Court, heretofore. The case of the *Commonwealth* vs *Logan*, (5 *Lit.* 286) was, that the County Court had directed to be opened a road adjoining the land of Logan. The road was in fact opened, not as directed by the order, but on the land of Logan; and had been continued between twenty five and thirty years, on the same ground where it was opened by the first supervisors. It had been used and worked upon as a public highway for that length of time. Logan, the owner of the soil, fenced across it. The Court decided that Logan was not liable, and that placing the obstruction upon it did not amount to a nuisance, for which he was indictable. When no order has been produced establishing the road, and when, upon diligent search, none can be found, shall it be presumed, after the lapse of thirty years, accompanied with continued use of the road as a public highway, that it was established by law? And if such presumption cannot prevail, we then have the further question, whether the owner of the soil, in this case, shall, by his own conduct, be presumed to have dedicated it to public use, and thereby precluded himself from a right to maintain this action against the defendant? In the case of the *Commonwealth* vs *Abney*, (4 *Mon.*, 479,) the Court say, "Whenever the Commonwealth, by her officers appointed for that purpose, have exercised jurisdiction over a road, by appointing overseers, opening, working and repairing it, and the public have been suffered to use it as a highway, the evidence of such jurisdiction and locality and use is *prima facie* evidence for the Commonwealth; and the burthen must lie on the obstructor of such a road, to show the illegality or impropriety of such jurisdiction." That no order of Court has ever been made, laying out or establishing a road, or that a road long used by the public, has never been by the public authorities, lawfully appropriated to public

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ELLIOTT vs TREADWAY.

use, can, generally, only be proved by negative testimony. Such testimony has been, in this case, given by the keeper of the records. The Clerk has stated that he has made diligent search and cannot find any order establishing the road. By the want of indexes or alphabets to the County Court records, it is often difficult to find an order which may have been made many years since. It is often necessary to read carefully page after page, and order after order, to find the desired object of record. For these reason, the evidence of the Clerk ought not, perhaps, to be regarded as conclusive of the question at issue. Nevertheless, it very strongly conduces to the belief, that no such order ever was made, and with other evidence in this cause, leads us to the conclusion, that the passway or road involved in this issue never was established as such by the public authorities.

Where a public highway had been opened and recognized by the public and county authorities as such for 25 or 30 years, with the knowledge of the owner of the land, held that it was not a trespass to remove peaceably an obstruction placed in it by the owner of the land—his acquiescence is evidence of a dedication of the ground to public use.

Do the facts proved in this case authorise the presumption of dedication to the public use by the owners of the soil? It is said that a long user of a way without any obstacle, at a time when the owner of the soil is in possession, and cognizant of the user, will afford the strongest presumption of a dedication: (*Woolrich on Ways*, 10.) When a passage leading from one to another part of a street, (although by a most circuitous route,) had been open to the public for several years, without either a bar or chain across it, or any mark denoting private property, and had been lighted by the city of London for a considerable time, it was decided that this was a public road: (*ibid*, 12.) A dedication of a right of way to the public is presumed, when the owner of the soil throws open a a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing along it by positive prohibition: (*Phillips' Ev.* 196.) Where a street was widened from forty to sixty feet, and accordingly used by the public for nineteen years, although no legal measures had been taken to divest the title of the owner, it was held that the non-claim of the owner for such length

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of time, connected with his acts, such as the payment of an assessment for paving the street the full width, and the recognition of the appropriation of the twenty feet, were sufficient to establish the right of the public to the use of the street to the full width of sixty feet, and that he could not maintain an action of trespass against one who removed a fence erected by the plaintiff on this twenty feet: *Denning* vs *Roome*, (6 *Wendell*, 651.) Such are the authorities on this subject. Many others might be quoted, but it is unnecessary to do so.

Where the owner of the soil merely permits the public to travel uninterruptedly over or upon his land, we would not be understood as saying that such permission, continued for any number of years, would preclude him from enclosing the land and excluding the travel; but where, as in this case, the road is a lane between two fences, where it has, without question, been used as a public highway for twenty five years, at least, been universally recognized as such by all in the neighborhood of the road; where the owner, as is proved in this case, has so recognized it, and at one time attempted to procure an order to discontinue it; where for a period of fifteen years past, the County Court have, from time to time, appointed overseers of it as a public highway, and hands have been allotted and worked it as such, and all this with the knowledge of the owner of the fee, and without objection on his part; we think he ought not now to be permitted to sue as a trespasser upon his possession, one who peaceably removes obstructions from the way. And as the action of the Circuit Court was substantially in accordance with this opinion, the judgment is therefore affirmed.

Apperson for plaintiff; *Farrow* for defendant.

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CASE.

Case 9.

Brasher *vs* Kennedy.

ERROR TO THE KENTON CIRCUIT.

Ferry keepers and owners. Master and Servant.

December 8. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

BRASHER was the owner of two slaves, who ran away, and were conveyed across the Ohio river on a ferry boat, at a ferry established from Covington to Cincinnati. Kennedy was part owner of the ferry, but was not present when the slaves were conveyed across the river, nor does it appear that they were carried over with his knowledge or consent. A man by the name of Owens was acting as his agent and ferryman at that time. The slaves made their escape, and were lost to their owner.

This suit was brought by Brasher against Kennedy, as owner of the ferry, for the value of the slaves. The court below refused to instruct the jury, at the instance of the plaintiff, that if Kennedy was one of the owners of the ferry, and had the control of it at the time the slaves were carried across the river, that he was liable to the owner for their value, whether the act was done with his knowledge or consent, or without it. The defendant obtained a judgment, and the plaintiff has brought the case to this court for revision.

Under the statute of 1831 (1 *Stat. Law* 715) the owner of a ferry on the Ohio is not liable to the owner for a slave escaping by the ferry without his knowledge or consent. (8 *Dana*, 158.)

The action was founded on the statute of 1831, (1 *Stat. Law*, 715,) entitled an act to regulate ferries, and the owners and keepers of ferries, across the Ohio river, within this Commonwealth. In the case of the *Covington Ferry Company* vs *Moore*, (8 *Dana*, 158,) it was decided that the owner of a ferry is not liable, under the provisions of that statute, for the unsanctioned act of his agent, or responsible ferryman; but that the penalty against the owner is incurred only by his own voluntary act. That decision was noticed and approved

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in the case of *Johnson & Co.* vs *Bryan*, (1 *B. Monroe*, 292.) It is true, that in the last case, the proper construction of the statute of 1831 was only incidentally and not directly involved in the determination of the question before the Court, and therefore what was said on that occasion by the Court, in its opinion, cannot be regarded as an express adjudication on the subject.

It is now contended, with great earnestness, that the construction given to the act of 1831, in the case of the *Covington Ferry Company* vs *Moore*, is incorrect, and virtually defeats the whole object and design of the legislature in its passage, which was to prevent the escape of slaves across the Ohio river, by making the owners of the ferry, on whose boat they might pass over, liable for the acts of their agents whether sanctioned by them or not.

This statute being highly penal should not in its construction be construed to extend beyond the clearly expressed intention of the Legislature.

The statute is highly penal in its character and provisions. For its violation, it subjects the owner of the ferry, not only to the owner of the slave for its value, but to a penalty of two hundred dollars and a forfeiture of his ferry franchise, which is never to be re-granted to him, or to any person in trust for him. It can hardly be presumed that the legislature intended to impose such a severe and heavy penalty upon the owner of a ferry for the unauthorized acts of an agent. Had such been the intention of the legislature, it would no doubt have been clearly expressed by enacting that the owner or owners of a ferry, who, by themselves, or their agents, servants, or ferryman, shall offend against and violate the provisions of the act, shall incur the penalties denounced by it. The language of the statute, however, makes the owner of the ferry liable alone for his own acts. Other persons, whether acting as his agents or not, are liable for violating its provisions, but they are not subjected to as heavy a penalty as that which is imposed upon him.

The act of 1820, upon the same subject, expressly makes the owner or keeper of the ferry liable, where any slave shall be taken over the river by a ferryman who shall be a slave. If the legislature had intended

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BRASHER vs KENNEDY.

by the statute of 1831, to extend the liability of the owner of the ferry, and to subject him to its penalties for the acts of other persons in his employment, as well as a slave, such intention would certainly have been manifested by appropriate language, and not left to be collected from its provisions as a matter of implication and doubtful construction.

We believe the judicial interpretation heretofore given to the act of 1831 to be correct, and perceive no reason to induce us to depart from it.

It is argued, however, that Kennedy is liable to Brashear, for the value of the slaves lost, upon common law principles, and independent of the statute upon which the suit was founded.

Conceding such to be the case, and whether it is or not, it is not now necessary to determine, we do not consider the declaration sufficient to sustain the plaintiff's action at common law.

A declaration against the master for the acts of his servant should not charge the act to have been wilful, but negligently permitted. (1 *East.* 106: 3 *Ib.* 393: 2 *Chitt. Plead.* 710, *note u.*)

The declaration is expressly framed upon the statute. It charges the act to have been done by the defendant himself. The injury to the plaintiff is not alleged to have arisen from the negligent, unskilful, or unfaithful manner in which the ferry was kept, but to have consisted in the defendants own act of conveying the slaves across the river without the consent of the owner. It makes the act wilful by the defendant himself. The declaration against the master for the act of his servant, should not state it to have been committed wilfully, but should show that it was committed negligently: (1 *East.* 306; 3 *East.*, 593; 2 *Chitty's Pleadings*, 710—*note u.*) The negligence may be stated to be that of the master, without noticing the servant; but if the master is proceeded against, as in the present case, for the act of the servant, and the injury is alleged to have been produced by the wilful conduct of the defendant, the declaration will be insufficient to maintain the action. Besides the direct reference in the declaration to the statute of 1831, shows that the suit was brought upon the statute, and was not intended to subject the defendant to damages on account of any common law liability.

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Wherefore the judgment is affirmed.

Lindsey for plaintiff; *Morehead & Stevenson* for defendant.

Graves *vs* Graves.

ERROR TO THE MARION CIRCUIT.

Widows. Exemption of property of deceased persons.

JUDGE SIMPSON delivered the opinion of the Court.

December 10.

The main question in this case is, whether the statutes, which set aside certain specified articles of property out of the decedent's estate for the widow and infant children, if any, apply alone in cases where a person shall die intestate, or have an application, also, where he shall die leaving a last will and testament.

By the statute of 1843: (*Session acts*, 1842–3, *p.* 17,) it is enacted, "that every species of property exempted from execution or distress, by the act of 1842, shall be exempted from sale by executors and administrators, and such property, so exempted, shall not be considered assets in the hands of the executor or administrator, but shall be reserved to the widow and infant heirs, if any." If this statute has not been repealed, the exemption clearly applies to both class of cases.

The statute of 1843: (*Ses. Acts. p.* 17,) reserves to the widow and children of a person dying with or without will, the same property which was then exempt from sale under execution.

By an act passed at the same session, the execution laws were amended, and instead of an exemption of certain species of property, two hundred and fifty dollars' worth of property was exempted from execution. No change, however, was made by this act in the law reserving certain property of the decedent for the benefit of his widow and children.

By an act passed in the year 1845: (*Session acts*, 1844–5, *p.* 35,) the Legislature expressly repealed the act of 1843, exempting two hundred and fifty dollars' worth of property from execution, and adopted the previous policy of exempting from execution certain specified articles of property only. By this last act, the same

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property which it exempts from execution is reserved for the benefit of the widow and infant children of any person that shall die intestate, but no reference is made to cases where persons shall die leaving a will. By the last section of the act, it repeals all acts that come within its purview.

It is contended, that the act of 1845 repeals the statute of 1843, in relation to the reservation in favor of the widow and children, as well as the statute of the same session which exempted two hundred and fifty dollars' worth of property from execution.

The object of the act of 1845 was to regulate the law exempting property from execution. All other acts on that subject are repealed by it. The exemption in favor of the widow and children of a person dying intestate, is not in conflict with a similar exemption in a previous statute in favor of the widow of a person who died with a will. There is no provision in the statute from which an intention upon the part of the Legislature to confine the reservation to one of the class of cases, to the exclusion of the other, can be deduced. Nor does there seem to be any good reason for discrimination between them. Where a person dies insolvent, the reservation is equally necessary and beneficial to the widow, whether he dies testate or intestate. A construction, therefore, which would establish such a discrimination is inadmissible. It is not necessarily established by any thing contained in the statute, and should not be by judicial interpretation.

The statute of 1845: (*Ses. acts, p. 35,*) does not repeal the act of 1843, reserving to the widow &c. of persons dying with or without will, the same property which, by that act, is exempted from sale under execution.

We are, therefore, of the opinion that the plaintiff in the Court below was entitled to the exempted property, although her husband died leaving a will. Her renunciation of the will was unimportant, and it is, therefore, immaterial whether the instrument of writing containing that renunciation was properly authenticated or not, as its admission as testimony was not necessary to enable the plaintiff to maintain her action, and would not operate to the prejudice of the defendant.

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It is unnecessary to decide, in this case, whether a will might not contain provisions which would deprive the widow of her right to claim exempted property under the statute, particularly without a renunciation of its provisions for her benefit. The will is not made a a part of the record, and its contents do not appear. We only now determine that the mere existence of a will does not of itself preclude the widow from asserting her claim to the property reserved by the statute for the benefit of herself and her infant children, if any.

Whether the provisions of a will unrenounced by the widow, might not preclude her from the benefit of the provisions of the statute—not decided.

By the act of 1843, the property reserved is expressly declared not to be assets in the hands of the executor or administrator. No demand of it, therefore, from the executor, by the plaintiff, was necessary to enable her to maintain her action. The title to the property vested in her, and its sale by the executor was unauthorized and illegal, and she had a right to maintain an action of trover against him for its conversion: *Jackson* vs *Bryan*, (3 *J. J. Marshall*, 309.)

Trover may be maintained, in such case, by the widow, against the executor who sells the property reserved by law for her without a demand.

Whether or not the plaintiff's husband was a housekeeper at the time of his death, was a question of fact for the jury to determine, which was fairly submitted to them, and they having found a verdict for the plaintiff, and the Court below having overruled a motion for a new trial, we do not feel authorized to disturb that verdict.

Wherefore, the judgment is affirmed.

Rountree & Fogle and Thurman for appellant.

Squires and Rogers & Garnett *vs* Smith.

REPLEVIN.

ERROR TO THE BOURBON CIRCUIT.

Case 11.

Mortgages. Replevin.

JUDGE GRAHAM delivered the opinion of the Court.

December 13.

THIS is an action of replevin, by John B. Smith against Squires, &c., for taking some horses, which the plaintiff

The case stated.

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Squires & Rogers & Garnett vs Smith.

avers to be his property, taken from his possession by the defendants. The defendants plead not guilty, but, by agreement, leave was given to either party to give in evidence, any matter which might be specially pleaded. The facts, so far as it is necessary now to notice them, are, that the horses sued for, had, together with other property, been mortgaged by Willis T. Smith to his father, John B. Smith, and were afterwards delivered into the possession of the mortgagee, who took them home with him and occasionally used them, (as did also said Willis.) The horses were taken to Paris by the parties to the mortgage for the purpose of sale, and whilst in the stable of the tavern keeper, were levied upon by Squires, a Constable, by virtue of executions in his hands, in favor of his co-defendants, against the estate of Willis T. Smith, the levy being made by their direction. The Constable made the levy, and when asked by the the counsel of John B. Smith as to the nature and object of his levy, declared that *they* had levied upon the horses as the property of Willis Smith, and, as such, intended to sell them, in disregard and defiance of the mortgage.

This action was then commenced, and the property restored to the plaintiff, the mortgagee.

The Court, at the instance of Smith, instructed the jury that if the horses in contest were the same mentioned in the mortgage, and the possession of them had been surrendered by W. T. Smith to plaintiff, under the mortgage, before the issuing of the execution, and were in plaintiff's possession at the time of the levy, and that the defendant, Squires, by direction of the other defendants, levied on said horses for the *avowed* purpose of selling, in disregard of the mortgage, and not for the purpose of selling the equity of redemption, they should find a verdict for the plaintiff.

The propriety of giving this instruction is the principal matter to be now settled. It will not be amiss, to advert briefly to some former adjudications of this Court on kindred questions of law. In the case of *McIsaacs* vs *Hobbs*, (8 *Dana*, 271,) where the mortgagee had pos-

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session of the property at the time it was levied on by an officer, under execution against the mortgagor, this Court said that where the levy recognizes the mortgage, and the property is seized for the mere purpose of selling the mortgagor's interest according to the statute, the taking is clearly lawful, and the remedy by replevin, which only lies for an unlawful taking, is inapplicable. The Court did not admit that the mere failure of the officer to recognize the mortgage in making the levy would constitute the seizure an unlawful taking; but waived the question, (as not necessary then to be decided,) whether a levy, made in open defiance of the mortgage, and with the avowed intention of disregarding it in the sale, would authorize this proceeding before an attempt or offer to make the sale in that way. In the case of *Fugate* vs *Clarkson*, (2 *B. Monroe*, 41,) where the mortgagee was entitled to the possession of property remaining with his mortgagor, it was determined that the action could not be maintained against an officer, who, though apprised of the mortgage, had taken it under a *fi. fa.*, as the absolute property of the mortgagor, and had avowed his determination to sell it without regard to the mortgagee's claim of title.

The levy of an execution upon personal property mortgaged, whether in the possession of mortgagor or mortgagee is lawful, and the declaration of the officer that he intends to sell the absolute estate in the property does not render the taking unlawful and authorize the mortgagee to prosecute an action of replevin.

The question reserved in *McIsaacs* vs *Hobbs* is now to be settled; and in review of the cases cited, we think the principles therein asserted fully determine this case. That the officer, with a *fi. fa.* in his hands against the estate of the mortgagor, has authority to levy it upon the mortgaged property in the possession of the mortgagee, was determined in the case first quoted, and cannot be doubted. He has a right to take. Can his declaration that he takes in defiance and disregard of the mortgage, and that he intends to sell the property, absolutely, and not subject to the mortgage, make that act illegal, which, but for such declaration, would be lawful? We think not. Declarations of intention and motive affect very materially the question of innocence or guilt in criminal offences, but are, by no means, an unerring test of the legality of an act in such a case as this. In the case of *Swigert* vs *Thomas*, (7 *Dana*,

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223,) it is said that whatever may have been Swigert's motive or object in taking the property, yet if as agent of the mortgagees he could have legally taken the slaves from Thomas, that authority should protect him; and, as was said by the Court, in *Fugate* vs *Clarkson*, (*supra*,) if the officer's "expressed determination to disregard the mortgage cannot be judicially recognized as an illegal *act*, or that he had violated the law in taking the property, or would violate it in the sale."

It seems to us that the *fi. fa.* in the hands of the officer justified him in taking the property, and that the action of replevin cannot at present be maintained. He may, as he has a right to do, change his intentions before he sells, and may sell subject to the mortgage, as he ought to do if the mortgage is in good faith. After the sale, the mortgagee's rights and remedies have been clearly pointed out in the cases cited in this opinion.

As the instructions given to the jury, and the verdict of the jury, were inconsistent with this opinion, the judgment of the Circuit Court is therefore reversed, and cause remanded with directions to set aside the verdict and judgment, and grant the defendants a new trial without costs, and for other proceedings not inconsistent with this opinion.

W. O. & T. P. Smith for plaintiffs; *Davis* for defendant.

CASE.

Case 12.

Kelsoe *vs* Ellis.

ERROR TO THE MONTGOMERY CIRCUIT.

Practice at law.

December 14. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action on the case was brought by Ellis, as surviving partner of the mercantile firm of Ellis & Gatewood, to recover from Kelsoe, who had been employed as the clerk of said firm, a loss alleged to have been sustained by the plaintiff, as survivor, &c., in conse-

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quence of a false entry made in the account of the disbursement of a large sum of money deposited with said firm by B. Hurt, to be paid out to him, or on his verbal or written order. The false entry consisted in a charge against him of $200, as paid to Judge French or Mr. French, when such payment was not in fact made. The first count alleges that the defendant appropriated the money to his own use, and that Hurt afterwards recovered the said sum of $200 and costs against the plaintiff, as survivor, &c., in an action, at law, in the defence of which he incurred large costs and expenses, &c. The second count does not specify the entry complained of, but stating the duty of the clerk in taking care of the money, &c., and keeping the accounts, &c., alleges that he neglected his duty, and took such bad care, &c., and kept the accounts of disbursements, &c., so badly and incorrectly, that the plaintiff, as survivor, &c., was greatly injured by the improper charges and mode of keeping the accounts of said disbursements for Hurt, so that a large sum of money was wholly lost to him, together with a large amount of costs, &c. &c. A demurrer to the declaration was overruled and a trial had upon the plea of not guilty, filed with the demurrer. A verdict for $200 was found in favor of the plaintiff, and the defendant's motion for a new trial having been overruled, he seeks a reversal of the judgment against him by writ of error.

The practice of making up and signing bills of exceptions in vacation not approved by the Court of Appeals though the parties held to their agreement that it should be so done no unfairness appearing.

The record shows that on the day on which the verdict was rendered, which we suppose to have been the last day of the term, the defendant, by his attorney, filed his bill of exceptions herein, "and by consent of the parties, in Court, they are to be corrected and hereafter lodged with the Clerk of this Court, to be recorded, and are to have the same effect as though they were fully made out and signed at this term." We understand from this entry that the bill of exceptions, then tendered, was imperfect and was to be perfected out of Court and after the expiration of the term. Which was no doubt done. And it is now contended that the paper purporting to be a bill of exceptions, not having

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been made up in Court, nor even in term time, but having been, at least, completed and signed and sealed out of Court, and in vacation, should not be regarded as a judicial act, or as a part of the record of the case; and that there is consequently no bill of exceptions presenting a case for the revision of this Court. But however unanswerable these positions might be, if the proceeding objected to had not been sanctioned by the consent of the parties entered of record, and although we cannot approve, but are disposed to discountenance the practice of making up the bill of exceptions and having it made a part of the record in vacation, even under such a sanction; yet as without the consent given in this case, and which for all that appears may have been voluntarily tendered, the defendant's counsel might, perhaps, have completed the bill of exceptions during the session of the Court, or if this could not be done, might, and doubtless would, have obtained leave to file it at the next term, it would be a palpable hardship and injustice now, when each of these alternatives is wholly out of his power, to deprive him of the benefit of that consent under which he has acted.

What might, or should be done by this Court, in case it were made to appear that the party to whom this privilege was accorded had grossly abused it, by withholding from the other party a reasonable opportunity of inspecting and correcting the exceptions, and by procuring from the Judge, by imposition, his signature to a perverted statement of the proceedings in the case, we need not say. Upon the affidavits and counter affidavits relating to this subject, as presented upon the motion to continue the cause in this Court, for the purpose of attempting to have the bill of exceptions corrected in the Circuit Court at its next term, we did not perceive any evidence of unfairness on the part of the counsel who drew the bill of exceptions, either towards the opposite counsel or towards the Judge, whose signature and seal, at three different places, stating exceptions taken to his opinions, in different stages of the case authorized the presumption that he had duly inspect-

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ed and considered the instrument, and that in his opinion it was substantially correct. And as there was no prospect of an alteration of the bill of exceptions by consent, and no apparent ground for any coercive action of the Circuit Court upon the subject, nor any probability that he would even deem any substantial alteration necessary to the justice of the case; and as moreover we were satisfied upon inspection of the record, that although the evidence may not have been stated as fully or as decisively in favor of the plaintiff as if it had been written out by one who was not concerned in the case, it was yet sufficient to authorize the verdict, if the instructions were correct; and that even if stated as the counsel for the plaintiff desired, it would not have cured any error in the instructions, which we must assume to have been correctly stated, there seemed to be no plausible motive for continuing the cause, and no valid objection to a decision of it upon the record as now presented. We proceed, therefore, to a brief statement and consideration of the instructions given on motion of the plaintiff.

These were, 1st, "that if the jury believe from the evidence that the money was paid out of the store by the defendant and not to Judge French, then the law was for the plaintiff, and they must find for him;" and 2d, "if they believed the money was paid to B. Hurt or some one else, and the entry was made so negligent as that the plaintiff must be the loser, then they must find for the plaintiff."

The first of these instructions makes the defendant liable for a mere error in the name of the person who received the money, although it may have been properly paid out and the plaintiff may have received the benefit of the payment, which is clearly erroneous. The second instruction supposes that the money may have been paid out by the plaintiff himself, or some one else, and not by the defendant; and it is not sufficiently explicit in stating that in such case the liability of the clerk depends upon his having, through mere negli-

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CASE vs FISHBACK.

gence, entered incorrectly a fact which was correctly communicated to him.

The instructions being erroneous, the verdict set aside and new trial granted.

For these errors in the instructions, the judgment must be reversed. And we only remark further in reference to an error committed against the plaintiff, that although the record of the suit of Hurt against him was not admissible to prove that the clerk, the defendant in this action, was liable, it was admissible to prove that a judgment was obtained by Hurt against the plaintiff for the money stated in the entry, now in question, to have been paid for him to Judge or Mr. French.

For the error in the instructions above noticed, the judgment is reversed and the cause remanded for a new trial in conformity with this opinion.

Daniel, Farrow, and Robinson & Johnson for plaintiff; *Apperson* for defendant.

CHANCERY.

Case 13.

Case *vs* Fishback.

ERROR TO THE BOURBON CIRCUIT.

Equity jurisdiction. Consideration, failure of.

December 14. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

JOSEPH CASE exhibited a bill in chancery in which he alleges that he executed a note of eighteen dollars to Fishback, as the surety of James A. Case, the note being, as he understood, for the price of a mare purchased by James A. Case from Fishback; that James A. Case never got the mare into his possession; that he believes she was taken by Fishback, after the sale, from the complainant's farm where he had her at that time; that the note was executed for the price of the mare, and for no other consideration, and therefore, there was a total failure of the consideration for which it was executed.

He also alleges in his bill, that a judgment at law had been obtained against him on the note, upon an appeal to the Circuit Court; that upon the trial of the ap-

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peal, he relied, but without success, upon a set-off, which he again asserts in his bill; but not then having any knowledge of the failure of the consideration of the note, which fact he has since discovered, he did not set up, or rely upon it, as a matter of defence in the trial at law. He made Fishback and James A. Case defendants to his bill, and prayed for and obtained an injunction against the collection of the judgment at law. Fishback having filed a demurrer to the bill, it was sustained and the bill dismissed. To that decree Joseph Case has prosecuted a writ of error.

The equity relied upon by the complainant was two fold; a set-off, and a failure of consideration. The first was a purely legal defence, and was, moreover, destitute of all equity, having been set up and relied upon in the trial at law. But the latter presented matters affecting the equity of the demand, and was sufficient to require the interposition of the Chancellor, unless some reason existed which precluded him from extending his aid.

It is contended that the matters relied upon, constitute a good legal defence, and that a Court of equity has no jurisdiction to give any relief, upon the ground that the consideration of the contract has failed.

It is, however, a legal defence which did not exist at common law. The right to it was given by the statute of 1801, which authorizes a defendant to impeach the consideration of a bond by special plea.

Courts of equity alone prior to 1801 had jurisdiction to grant relief where there was a failure of consideration, and since that statute, still have exclusive jurisdiction to grant relief where the failure is only partial. Giving jurisdiction to courts of law where there was a failure of consideration, did not oust the Chancellor of his jurisdiction —it was still concurrent.

Before the passage of that act, the only remedy in a case like the present, was in a Court of equity. Upon the facts alleged, it would have been unjust and inequitable for the vender to demand the purchase money. If he made and persisted in such a demand, the Chancellor would have interfered and restrained its collection. The statute does not permit the defendant to rely upon a partial failure of consideration, and where such a case exists, the only remedy is still in equity.

Where courts of equity originally obtained and exercised jurisdiction, that jurisdiction is not overturned or impaired by courts of law having subsequently granted

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CASE vs FISHBACK.

a remedy in similar cases. Where the power has been conferred upon the courts of law by legislative enactment, the uniform interpretation is, that it confers concurrent and not exclusive jurisdiction: (1 *Story's Equity, sec.* 80.)

If the defence is purely legal and the party neglects to defend, equity will not afford any relief. But when the courts of law and of equity have concurrent jurisdiction, the Chancellor will relieve, notwithstanding the defence might have been made at law: (2 *Bibb*, 200; 3 *Bibb*, 248; 2 *J. J. Marshall*, 139.)

Where Courts of law and equity have concurrent jurisdiction, the Chancellor is not deprived of his right to grant relief, unless the party has defended at law and failed.

The Courts, in this case, having concurrent jurisdiction, and the defence not having been made at law, it is not material whether the reason assigned by the complainant for having failed to make it in trial at law is satisfatory or not. The Court has jurisdiction, whether the failure to make a defence at law was or not occasioned by the want of necessary information for the purpose. And, surely, the fact alleged by the complainant, that he has made the discovery of the matters now relied upon since the trial at law, even if he might, by reasonable vigilance, have made it previously, does not diminish his claim upon the aid of the Chancellor.

The decree of the Court below, dismissing the complainant's bill, absolutely, is erroneous, as James Case, who was a necessary party, was not served with process, even had it been right, which it was not, to sustain the demurrer for want of jurisdiction.

Wherefore, the decree is reversed and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Williams for plaintiff; *Smiths* for defendant.

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Esham and Wife *vs* Lamar.

CHANCERY.

ERROR TO THE MASON CIRCUIT.

Case 14.

Mortgages. Conditional sales.

JUDGE GRAHAM delivered the opinion of the Court.

December 16.

Case stated.

THE father of Mrs. Esham, having by a written instrument, vested in her and her four children, the title to a young negro girl, aged about ten years, the complainants, Esham and wife, in the year 1844, removed with their family to Kentucky. On the 26th of December, 1844, Lamar advanced to them twenty five dollars, and in consideration of which sum, they executed to Lamar an absolute bill of sale for the negro girl. At the same time, by another instrument of writing, they covenanted, in consideration "that Lamar agrees to keep and clothe said girl for the term of eight years, to labor for him as a house servant, they undertook to guarantee to Lamar the possession of the girl for said eight years, being the interest of their children, which, by said instrument, they put out and bound to said Lamar."

At the same time, Lamar executed and delivered to Esham and wife an instrument of writing, setting forth that on that day he had bought of Esham and wife, for the sum of twenty-five dollars, all their interest in said girl; and then said writing says: "Now it is understood between the said Esham and wife and the said Lamar, that if the said Esham shall, within the eighth year from this date, pay to the said Lamar the said sum of twenty-five dollars, with interest from this time, then the said Lamar will surrender up the said negro girl, if alive, to the said Esham and wife; but if they do not so redeem said negro in the said eighth year, from this date, then they are to forfeit all right to do so, and the said interest of Esham and wife is to belong absolutely to the said Lamar, but if they do redeem said

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ESHAM & WIFE vs LAMAR.

negro, then the bill of sale, dated this day, is to be void."

Lamar had the girl in his possession at that time, and she has so continued up to the present time.

On the 4th of June, 1847, Esham and wife, brought this suit in Chancery, alleging that they were, at the date of the transaction, in almost utter destitution, strangers, without friends or credit, and in "*extra*" want of the common necessaries of life; that Lamar being apprised of their condition proposed to lend them the twenty-five dollars and take the girl as a pledge for the re-payment of the money with interest; that they are very ignorant, and when they entered into the contract and executed the writings, understood that they had the privilege of redeeming said slave at any time within the eight years, by re-paying the money with interest; that the girl is worth between three hundred and four hundred dollars, and worth, on hire, twenty-five dollars per annum. They ask relief. Lamar does not controvert the destitute and necessitous condition of complainants, but denies that he took advantage of that condition. He insists that the contract was fair; that it was made reluctantly by him, and at the urgent solicitations of the complainants. He and complainants had been raised in the same neighborhood in Maryland. He insists on his right to retain the girl for eight years, and would not have advanced his money for any shorter period. The proof does not show that the complainants misunderstood the import of the writings. The negro is shown to have been for a while, say for a year or two, only worth her clothing and feeding, by way of hire, but afterwards worth $20 or $25 per year.

The defendant's counsel insists that the transaction cannot be regarded as a mortgage; that it is in fact a conditional sale, and that the defendant cannot be required to receive his money, and yield up the possession of the slave, until the eighth year after the purchase. We are referred to ***Sloan's administrator*** vs ***Willis***, (4 *B. Mon.* 497,) as conclusively deciding this

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controversy for the defendant. In that case, the contract was made in 1812, a full and adequate price given for the negro, a privilege to re-purchase in two years; no attempt to re-purchase or re-pay, or claim the right to do so, was set up for eight years. In 1830 the suit was abated by complainant's death, and not renewed until 1841. In view of these facts, the Court, as we yet believe very properly, refused to relieve the complainants.

This case is presented under a very different aspect. The slave is proved to be worth at least $350. Her hire for a single year, would be nearly worth the sum advanced. Here is no delay. The only complaint, as to time, is, that the complainants have come too soon. The face of the instruments make the transaction an absolute sale, with permission to redeem. But whether it is a conditional sale, or a mortgage, is immaterial.

The chancellor will not enforce a hard and unconscientious bargain extorted from one who is feeble minded and in distress, but rescind at the instance of the injured party.

The facts stated in the opinion and proved by the record, manifest, conclusively, that the contract, on the part of Lamar, was hard, unconscientious, and extorsive, and such as the peculiarly unfortunate circumstances of his old Maryland neighbors, should have forbidden him to make. It is a contract which ought not to be enforced, but on the contrary, is of that character which the Chancellor, delighting to do equity and resist oppression, ought to rescind. The defendant has had ample use of the negro girl to fully re-pay him his twenty-five dollars and interest, and compensate him for taxes, clothing, diet, trouble, &c., and should pay the complainants a reasonable hire for a portion of the time. We think that by rescinding the contract, decreeing the $25, with interest, to have been already fully paid by the use and services of the negro girl, and that the defendant be required, forthwith, to surrender said girl and pay to the complainants, at the rate of $25 per year, from the 1st January, 1849, until possession of the girl is restored to complainants, ample justice will be done to him.

As the decree of the Circuit Court dismissing the complainant's bill is not in accordance with this opin-

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HALL & WIFE vs SAYRE.

ion, it is reversed, and cause remanded to said Court with directions to render a decree as herein suggested.

F. S. Hord for plaintiff; *Lindsey* for defendant.

CHANCERY.

Case 15.

Hall and wife *vs* Sayre.

ERROR TO THE FAYETTE CIRCUIT.

Femes Covert. Separate estates of femes.

December 15.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

A conveyance of land to a *feme covert* does not vest in her a *separate estate* in the technical sense of that phrase.

THE land, the subjection of which to the complainants demand, seems to have been the specific object of this suit, and which alone was subjected by this decree, does not constitute any part of the separate estate of Mrs. Hall, as described or secured in the deed of trust exhibited by the complainant. The deed of trust to Pope, which creates and secures the separate estate of Mrs. Hall in the property therein described, certainly does not convey the tract of land now in question, nor does it, so far as we can perceive from its terms, convey any real estate whatever. The tract now in question was conveyed by a stranger, six or seven years after the deed of trust, not to the trustee, but directly to Mrs. Hall in fee simple, without the expression of any use, trust or power. Such a deed to a married woman and her heirs, does not, by its own force, make the land conveyed the separate estate of the *feme* in the technical sense of that phrase. And if it would ever become so by reason of its having been acquired by appropriating the trust property or its proceeds to its purchase, there is no sufficient averment of the facts which would place it in this condition. And if there were, it never has been decided in this court that a *feme covert* may, without an express power of disposition reserved or granted, charge her separate real estate by a mere note for money, or that a Court of equity would enforce such a note by the sale of land. Nor, if it were admitted that, under the ante-nuptial agreement recited in

Can a *feme covert* without any express power being given charge her separate estate by a note for the payment of money? or can a court of equity enforce the payment of such a note by the sale of land.

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the deed of trust, any property afterwards acquired by the wife would *ipso facto* become her separate estate, does it follow that it would necessarily become subject to the power therein reserved, and especially to the modes of disposition mentioned or allowed in that deed in reference to personal property and slaves which were alone conveyed by it?

Both at law and in equity personal property and slaves should first be subjected to the payment of debts.

And even if all this were conceded, still, as a considerable estate in slaves and personalty is conveyed by the deed of trust, which is not shown to have been exhausted or even to have been insufficient to pay the complainant's demands, and as the notes evidencing these demands certainly created no specific charge upon the land, it was obviously improvident and in violation of the principle which prevails in the enforcement of debts, both at law and in equity, to subject the land without any effort to satisfy the claim out of the personalty. As for this error in the proceedings, the decree must be reversed, we do not deem it necessary now to decide the questions left undecided in the foregoing propositions. We have doubted whether the case should not be remanded, with directions to dismiss the bill without prejudice, inasmuch as the complainant has failed in his effort to subject the land, and has pointed out no other specific subject upon which the Chancellor is to act. But as his demands, to the extent at least of the two smaller notes, (of $350 and $200,) and perhaps to the whole extent, seem to be just and to constitute a charge at least upon the personalty and slaves belonging to the separate estate, and as the complainant makes general reference to the deed of trust and to the separate estate, and prays that the separate estate may be subjected, we conclude that it would be more consonant with justice and the practice in equity, to allow an opportunity for such further proceedings as may be necessary and proper for enforcing his demand against said separate estate. In doing which, however, the defendants will also be entitled to a further opportunity of contesting the justice of said demand, with regard to which we only remark the subsistance of the largest

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NEELY & OTHERS vs HUTLER &C.

one, (upon the note for $468 81,) as an unsettled debt, is not free from doubt. The claim upon the $200 note, if it has been withdrawn, may be again brought into the case. But there is no propriety in litigating in this suit, except as bearing upon the question of the payment of the note for $468 81, the disposition made of the property mortgaged to the complainant by T. P. Trotter. The claim of Hall as administrator, on account of the mortgage is, moreover, barred by time and was properly disallowed. In all other respects, except as to this claim of Hall, the decree is reversed and the cause remanded for further proceedings.

Robertson for plaintiff; *Sayre* for defendant.

EJECTMENT.

Case 16.

Neely and others *vs* Butler, &c.

APPEAL FROM THE SIMPSON CIRCUIT.

Husband and wife. Curtesy. Seizin. Trespass. Possession.

December 18.

JUDGE SIMPSON delivered the opinion of the Court—Judge Graham did not sit in this case.

Case stated.

THIS was an action of ejectment, brought by the appellants against the appellees. The following facts were established upon the trial: That the plaintiffs' lessors were the heirs of Elizabeth Bradley, deceased; that the said Elizabeth, during her lifetime, intermarried with Levin Bradley, and having given birth to a child, died leaving the child alive, who died four or five years after its mother; that the land in contest belonged to the said Elizabeth at the time of her marriage, having descended to her from her father, Edward Neely, deceased; and was, at the time of the marriage, and during the whole period of the coverture, in a wild and uncultivated state, the growth of timber upon it not having been disturbed. Bradley sold the land after the death of his wife, and his vendees and those claiming under them, who are the appellees, have been in possession, under the purchase, for several years clearing and cul-

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tivating it. No person whatever was adversely possessed of the land during the coverture, nor any other title to it heard of by the witnesses, except the title of the wife. The husband had paid the taxes on it from the time of the marriage until he sold it. But there was no proof that the wife had actual possession of it at the time of the marriage, or that the husband had entered upon it or acquired the actual possession of it, at any time during the coverture. The husband was still living.

The parties, by consent, dispensed with a jury and submitted the whole case to the Circuit Judge, who decided in favor of the defendants in the action, and from that decision the lessors of the plaintiff have appealed.

The question for decision.

The only question is, whether the husband, after the death of his wife, was entitled to the land as tenant by the curtesy? As there was no actual seizen of the land, by the wife or the husband during the coverture, it is plain that he was not tenant by the curtesy, if actual seizen be requisite to the creation of the estate. It is not denied that actual seizen was necessary for this purpose at common law, but it is contended that no such necessity exists in this state, in the case of lands which are wild and uncultivated; and we are referred to the decision of the Supreme Court of the United States: (1 *Peters*, 507,) and to the decision of the State of New York: (8 *Johnson's Report*, 271,) in support of this position.

Vanarsdale vs Fountleroy's h's distinguished from this.

The same question was made in this Court in the case of *Vanarsdale* vs *Fountleroy's heirs*; but, as in that case, the husband had acquired the actual possession of the land, during the coverture, by his vendee, who had entered and taken possession of it by the authority of the husband, which was deemed sufficient to perfect his title as tenant by the curtesy, it was not considered then necessary to decide it. And although the Court in that case stated, *arguendo*, that one of the reasons that existed at common law for requiring actual seizen, by the husband, of the wife's land during coverture, viz: to enable the heir to take the estate after the death

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NEELY & OTHERS vs BUTLER, &c.

of the wife, by descent from her, did not exist in this State under our law of descents, yet it was not intimated in that opinion that such seizen was dispensed with; but, on the contrary, a reason was given why the husband is required, in this State, to take the lands of his wife into actual possession, viz: to strengthen her title to them, and to protect them from intrusion and from a hostile possession which might, by its continuance, endanger her right. This reason exists in full force, and under the course of decisions in this State, in relation to the possession of real estate, makes an actual possession indispensibly necessary to the attainment of the object contemplated.

A patent does not give to the patentee actual, but a *legal* seizen only. (2 *Bibb*, 412: 4 *Ib.* 57.)

Actual possession is necessary to maintain trespass: *Walton* vs *Clark*, (4 *Bibb*, 218.) A patent from the Commonwealth does not invest the patentee with actual seizen, but only a seizen in law: *Steward's devisees* vs *Crawford*, (2 *Bibb*, 412,) *Speed* vs *Buford*, (4 *Bibb*, 57.) These doctrines have uniformly governed the decisions of this Court wherever they were applicable.

Trespass cannot be maintained upon a legal seizen nor a writ of right, nor forcible entry and detainer.

Now, unless the husband acquires actual possession of the lands of his wife, no action can be maintained against a trespasser, the injury committed by him has to go unredressed. An action of ejectment can be brought upon the right of entry, but a writ of right cannot be maintained unless there has been actual seizen, nor will a writ of forcible entry lie, unless there has been a possession, in fact, of the land claimed in the writ. The protection of the land from injury, and the speedy removal of a wrong doer from an illegal possession of it, by a writ of forcible entry, requires that the husband should have it in actual possession by himself or lessee.

It is the duty of the husband to strengthen the title of the wife to her lands by possession, if he fails to do so during the coverture he is not tenant by the cur-

And in this State, where there are so many conflicting claims to land, originating out of the mode in which the public lands were appropriated and titles to them acquired by individuals, it becomes very important to the claimants to have their lands reduced to actual possession, for the purpose of strengthening their titles against adversary claims. Actual possession might ren-

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der the title of the wife valid, even under a junior patent, if continued a sufficient length of time. And where she holds under the elder patent, such possession may be necessary to the security of her title, as there may exist an elder inchoate title by entry, although the patent may be a junior one. So long as the land remains unoccupied, and not reduced into actual possession, the lapse of time has no effect in strengthening the title of the wife, or creating a bar to an adverse and hostile claim. It is therefore the duty of the husband, to enable him to protect the land from injury, and for the purpose of fortifying the title of his wife, to take it into actual possession. The wife being disabled, by coverture to do it herself, the law devolves the duty on the husband, and if he fails in its performance, he has no interest in the land upon the death of the wife. The uniform course of the decisions in this Court, therefore, has been to regard actual seizen, by the husband during coverture, as necessary to entitle him to an estate in the land of his wife after her death, as tenant by the curtesy.

tesy after the death of the wife.

The doctrine of the Supreme Court of the United States is, that the title to waste and uncultivated lands draws to it the possession, and that the patentee, without any actual entry thereon, is deemed in possession, so as to be able to maintain a writ of right, or an action of trespass for entering upon the land and cutting the timber. The same doctrine is held by the New York Courts, and the consequence is, that if the wife be the owner of waste uncultivated lands, not held adversely, she is deemed seized, in fact, so as to entitle her husband to his right of curtesy. This doctrine, however, is in direct conflict with that which has been settled by this Court, and which has uniformly governed it in its decisions upon the same subject. The principles of the common law have been adhered to by it. No distinction has been made between cultivated lands and those that remain in a state of nature. A person acquiring title to lands, by descent or devise, or deed of bargain and sale, has no possession, in fact, before en-

The doctrine of the Courts of New York and Supreme Court U. S. *contra.*

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NEELY & OTHERS vs BUTLER, &c.

try. The title gives him or her a legal, but not an actual seizen. The patentee of wild uncultivated lands, although they are vacant, and not held adversely, is not, for any purpose, deemed seized in fact, before entry. He cannot even maintain trespass for entering upon the land and cutting the timber. He has a right of entry, but the exercise of this right is necessary to invest him with a full and complete title, which consists in the actual possession, and right of possession, and right of property combined.

The Supreme Court of the United States, and the Courts of New York, having settled the principle that the owner of waste lands is deemed possessed in fact, for certain purposes, before entry, it followed, as a necessary consequence, that when the wife owned lands of that kind, the husband, without having made an actual entry, was held to be seized, in fact, and entitled to his curtesy. In this State where a contrary principle has been established, and the owner of uncultivated lands is held not to have a possession, in fact, until it be acquired by entry, a different result is necessarily produced, and where the wife is the owner of lands of that description, of which she is not possessed, in fact, at the time of the marriage, the husband has no right to curtesy, unless he enters and acquires the actual possession during coverture. A different decision of the question would be virtually a departure from the settled doctrine of this Court upon the subject of legal and actual seizen of land, and the necessity of an entry by the owner to acquire the latter.

We are therefore of opinion, that upon the facts in this case, the husband, after the death of the wife, was not entitled to curtesy in the lands sued for.

Wherefore the judgment is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion.

Wilkins and W. L. Underwood for appellants; *Grider* for appellees.

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Craig *vs* Taylor and wife. Same *vs* Dale.

EJECTMENTS.

APPEALS FROM THE WOODFORD CIRCUIT.

Case 17.

Verdicts. Practice in Circuit Courts.

December 18.

JUDGE GRAHAM delivered the opinion of the Court.

Case stated and what had before been decided:—(*See* 6 *B. Monroe* 457.)

THESE are actions of ejectment brought by the appellees against the appellant to obtain possession of a tract of land sold by the Sheriff of Woodford, by virtue of executions in his hands against Craig, and at which sale the appellees became purchasers, and obtained a deed from the Sheriff for the land sold. A verdict having been rendered for the plaintiff, the case was brought to this Court by Craig's appeal, and the judgment of the Court below reversed: (6 *B. Monroe*, 457.)

Before the levy of the execution, by the Sheriff, on the land in contest, (which is part of a larger tract, then in Craig's possesion by previous conveyance from another,) Craig had sold a part of said larger tract to Christopher, and a line had, by parol, been agreed upon by the parties, Craig and Christopher, up to which Craig sold. In the deed from the Sheriff to the appellees, which specifies the entire boundary of Craig's tract, as it was previous to the sale to Christopher, so much of the said tract is excepted from the Sheriff's sale and deed, as Christopher was entitled to by agreement with Craig. The judgment was reversed mainly because in the opinion of the Court, "the evidence, as then exhibited in the record, did not authorise the jury to find that there had been such a severance of title as would have made the lessors in these actions tenants in common of a particular part of the tract to the exclusion of Christopher, and would have made him sole tenant of the residue," and for the further reason, if the evidence would have authorized such a finding, yet the verdict for a certain portion of the whole land men-

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CRAIG vs TAYLOR & WIFE, SAME vs DALY.

tioned in the declarations, did not necessarily imply that the jury did find that there had been such a division, and there was no referance in the verdict to any object or fact restricting their finding to any distinct portion of the boundary described in the deed, or that the possession of the defendant was thus restricted, and of course there was nothing to restrict the possession to be delivered to the plaintiffs.

After the case had been returned to the Court below, and the trial was had, and a verdict and judgment being again rendered for the plaintiffs, now the appellees, it is once more before this Court by Craig's appeal.

The evidence & decision on the last trial.

The proof now in the record is, that before the levy Craig and Christopher had agreed on a certain branch as the boundary, but at the time of the sale by the Sheriff, there had not been a survey made of Christopher's part. After the sale by the Sheriff, Craig said that the agreement with Christopher had been completed; that the recitals in the Sheriff's deed were correct, and the object of the survey was simply to get the quantity of land Christopher was to have from Craig. On the 14th November, being seven days after the Sheriff's sale, Craig made a deed to Christopher, according to the parol agreement made before the Sheriff's levy, and setting forth the metes and bounds of that part of the tract bought by him of Craig. At the date of the service of the declarations in ejectment, the defendant was in possession of the land. The defendant objected to the reading of the deed of Craig to Christopher as evidence to the jury, but the Court overruled his objections. In each of these cases the jury brought into Court the following verdict: "We, of the jury, find the defendant guilty of the trespass and ejectment in the plaintiff's declaration mentioned, and assess his damages, by reason thereof, to one cent." When the verdict was read, the jury, by their foreman, stated that they intended to find upon the line of division mentioned in the deed from Craig to Christopher, but did not think it necessary to put it in their verdict, nor did they deem it necessary to find the different interests of

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the plaintiffs; and thereupon the Court permitted the plaintiffs' counsel to write a form of verdict, which specifies the portion the plaintiffs recovery, and excludes the land contained in the deed to Christopher. The jury, on instructions from the Court that they had a right to review their verdict, make their own calculations and return the prepared verdict if they approve it, or modify or change it as they thought proper, retired and then brought in the verdict as prepared by the counsel.

The appellants, in their motion for a new trial, (the overruling of which is assigned for error,) insist that the Court erred in permitting the deed from Craig to Christopher to be read as evidence, and in permitting the verdict of the jury to be returned in the manner it was done, and in its instruction to the jury.

We do not perceive any error in the admission of that deed as evidence. It was but completing and carrying into effect the parol contract made before the levy. The sale was made, excluding the land sold to Christopher, the precise boundaries of which are now embraced in the deed, which was made by Craig himself. He has no cause of complaint, and had no right to object that it was used against him.

It is the duty of the court to see that the verdict of the jury is put in proper legal form, and so as to carry out their finding.

Nor do we perceive any error in relation to the verdict. It is the duty of a Court not only to see that the verdict of the jury be put into proper and legal form, but that it be so shaped as clearly to carry out the finding of the jury, whenever the Court are informed by the jury, as they were in this case, what fact they intend, by their verdict, to establish as true. The verdict, in each of the cases, specifies the portion of the land which each plaintiff should recover, and excludes expressly so much of the land conveyed to Craig, as had been conveyed by him to Christopher. It is, therefore, in strict conformity with the law of the case, as decided by this Court, when the case was here before: (6 *B. Monroe*, 457.) The instructions of the Court are in conformity with the principles heretofore, and now, settled in these cases.

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Prescott vs Prescott's H'.

There being no error in the judgment of the Circuit Court, they are therefore affirmed.

Hewitt for appellants; *Kinkead* for appellees.

Chancery.

Case 18.

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Prescott *vs* Prescott's Heirs.

Error to the Trigg Circuit.

Wills. Devises. Jurisdiction. Limitation.

December 19. Chief Justice Marshall delivered the opinion of the Court.

Case stated.

This bill was filed by three of the children and heirs of Mrs. Chloe Prescott, deceased, formerly Chloe Sawyer, against her other children and heirs and her husband, John H. Prescott, for a division of certain slaves, which they allege became the property of the children of said Chloe after her death, under and by virtue of a clause in their grandfather's will. John H. Prescott, the father of the complainants, contests their claim, on the ground, first, that the will referred to gives them no interest in the slaves, and, secondly, that he had had them in posession as his own for many years, and for seven years after the death of his wife, claiming them as his own, &c. The principal question in the case, arises under the will of David D. Sawyer, admitted to record in May, 1809, and which contains the following clause, under which the two slaves, therein mentioned, from whom the others now in contest descended, passed to the devisee, Chloe Sawyer, and are now claimed by her children: "Item, I lend the use of negroes Kate and George to my daughter Chloe Sawyer during her natural life, and at her death to be equally divided between the heirs lawfully begotten of her body, and for the want of such heirs, to fall to my daughter, Fanny Sawyer." A previous clause gives two slaves to the daughter Fanny, in precisely the same terms, and they are to fall to Chloe on the same contingency. But the contingency provided for does not appear to have happened, and the case stands upon the clause above quo-

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ted. The question is, whether the words "heirs of her body" are to be regarded as words of purchase, giving to the persons thereby designated, an independent estate, to commence in possession at the death of the devisee, for life, or whether they are to be taken as words of limitation, attaching to the previous estate, and enlarging it from an estate for life to an estate tail, which would give to the first devisee the absolute property; the consequence of which would be, that on her marriage, the slaves vested in her husband absolutely, and the persons who were the heirs of her body at her death would, as such, be wholly cut off.

"I. lend the use of negroes K and G to my daughter C during her natural life, and at her death to be equally divided between the heirs lawfully begotten of her body, and for the want of such heirs, to fall to my daughter F," held that upon the death of the daughter C, the slaves K and G and their increase belonged to her children.

Upon the words of the clause, we think it impossible to doubt that the actual intention of the testator was, that his daughter should have only an estate for life, and that at her death, such persons as were then the heirs of her body should take the slaves, and for want of such heirs at that time, they should pass to the other daughter, Fanny. This intention is indicated, not only by the express limitation during the natural life of the first devisee, but also by the terms of the gift to her, which import that she is to have the usufructuary interest only; and especially by the expressions, "and at her death to be equally divided between the lawfully begotten heirs of her body," by which it is clearly denoted that there was to be a division at her death, among those who, at that time, should answer the description of "heirs of her body," (probably meaning her children,) and that the testator intended a benefit to those particular persons, and did not intend to embrace the whole line of heirs of the body, to take in succession. And although it may be certain that the alternate devisee, Fanny, could not take under the will as long as there should be heirs of the body of the first devisee, we deem it equally certain, upon the words of the will, that it was only on the contingency of there being no heirs of the body of the first devisee, who might take at her death, that the alternate devise in remainder was to have effect. The word *such* in the devise over is relative only, and the expression "for want of such heirs"

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PRESCOTT vs PRESCOTT'S H'S.

means, for want of such heirs as were before designated and provided for, that is, heirs of the body of the first devisee living at her death.

The words "heir of the body" are properly used as words of *limitation*, and properly used for the creation of estates tail, which is an estate to a person, and the heirs (general or special) of his body. It is also true that the words "heirs of the body"—"heirs"—"heirs male or female of the body or of two bodies" may be used and operate as words of purchase.

It is true, the words "heirs of her body" are appropriate words of limitation, and commonly and properly used for the creation of an estate tail, which is an estate to a person and the heirs (general or special) of his body. But it is also well settled by numerous decisions, that not only "heirs of the body," but the more general word "heirs" or the more specific terms "heirs male, or heirs female of the body, or of two bodies," may be used and operate as words of purchase. It is a question of intention, whether these words are used to denote the whole line of heirs of the sort described, to take in succession as such heirs, or to denote only a particular person or class of persons who may come under that description at the time. When used in the former sense, they are words of limitation, defining or limiting the previous estate to which they apply. When used in the latter sense, they operate merely as *designatio personæ* or *personarum;* and are held to be words of purchase giving a new estate to the person designated.

If it be conceded that the rule in Shelly's case, "that wherever the ancestor takes an estate for life, and in the same conveyance an estate is limited to his heirs or the heirs of his body, he will be vested with the fee, and his heirs will take by descent, and not by purchase," (4 *Bibb*, 390,) is authoritative here, and applicable to a devise of slaves, its application is still subject to the question of the sense in which the word "heirs, or heirs of the body" are used. And although it may be *prima facie* inferred that the testator used the words as embracing the whole line of his heirs in succession, this inference may be overthrown by circumstances indicating with sufficient certainty a contrary intention, "to use the words in a more restrictive and untechnical sense, and to point out such individual person (or persons) as should be the heir, &c. of the tenant for life at his decease:" (*Fearne on Rem.* 188–9.) And if

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the words are so used, the application of the rule is repelled: (*Ib.*)

In the cases of *Doe* vs *Leming*, (2 *Burr*, 1100;) of *Doe* vs *Goff*, (11 *East*. 668;) *Gretton* vs *Howard*, (6 *Taunton*, 94;) and other English cases, in some of which the first devise was not expressly for life, the technical sense of the words "heirs of the body," was held to be restricted, and those words to be read as words of purchase, by reason of such additional words or directions as broke the ordinary course of descent, and showed that the estate was not to descend from the first devisee. Among these, the circumstance that the heirs of the body were, at the death of the first devisee, to take the estate expressly, share and share alike, or as tenants in common, or that it was to be equally divided between them, &c., held a prominent place; and in the two last cases this circumstance was clearly deemed sufficient to demonstrate that the testator meant "children," and not the whole line of heirs in succession. The case of *McNair's administrator* vs *Hawkins*, (4 *Bibb*, 390,) decided in this Court in 1816, adopts the same principle. And although the modern case of *Jesson* vs *Wright*, (2 *Bligh*. 1,) in which the House of Lords reversed the judgment of the King's Bench, in *Doe* vs *Jesson*, (5 *Maul & Sel.*, 95,) has, in opposition to the decision in the King's Bench, overruled the prior cases above cited in the point referred to; and although the decision in *Jesson* vs *Wright* may have been since followed, not only in England, but in several of the United States, as in *Ross* vs *Toms*, (4 *Devereux' Reports*, 277,) we find no case in which this Court has abandoned the principle recognized in the case of *McNair's administrator* vs *Hawkins*, and we do not feel bound to change the rule of property, as deduced from the decisions of our own Courts, declaring the law in conformity with former decisions in England, because the Courts of that country have changed the rule or declared it to be different, and have been followed in this change by other Courts in this country. It is manifest from the opinion delivered in the case of *Ross* vs

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Toms, (*supra*,) that if *Jesson* vs *Wright* had not been decided, or had not been heard of, the Court of North Carolina would have decided the case in conformity with the principles of *Doe* vs *Goff* and *Gretton* vs *Howard*.

We adhere to the principle of the case of *McNair's administrator* vs *Hawkins*, (4 *Bibb*, 290,) and are of opinion that there is enough in this devise, to show that the testator did not use the words, "heirs of her body," in the technical sense as embracing the whole line of her descendants in succession, but in the restricted and untechnical sense of denoting the individuals who might be the heirs of her body at the time of her death. We will not, on the presumption of a benefit intended to the whole line of heirs, as long as there should be any, and of a benefit intended to the daughter Fanny, or her heirs, upon the indefinite failure of the first line, however remote, give a construction to the clause contrary to the natural meaning of the words, and by which all benefit of the devise is taken away, both from the heirs of the body of the first devisee and from those who were to have the remainder. And we remark, as affording some confirmation to the view we have taken, that the ultimate devise is not to the daughter Fanny and her heirs, but to her alone.

The testator held to intend by the terms "heirs awfully begotten of her body" children at her death.

We are of opinion, therefore, that the children of Chloe Prescott, living at her death, and who were then the only heirs of her body, were entitled to the two slaves and their increase, to be equally divided between them. And as their father had not openly avowed an adverse claim, or possession, until within five years before this suit was brought, and had within that period admitted the title of his children, the statute of limitations cannot avail him as a bar to their claim. The complainants were therefore entitled to their share of the slaves, and to their rateable proportion of the hire for five years prior to the institution of the suit and up to the time of division or sale, the plea of the statute cutting off the claim for previous hire.

The Court had jurisdiction to decree a division or sale of the slaves, and as incidental thereto to deter-

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mine the question of title set up by the father who had only a part of the slaves in possession, some of them having been in possession of one of the devisees.

PRESCOTT vs PRESCOTT's H'rs.

The Chancellor has jurisdiction to decree a division of slaves and a sale thereof and in such suit to decide upon the title of parts of the lots claimed by others.

With regard to the slave George, who was sold by J. H. Prescott, the complainants are not entitled to follow his price into the land for which it was paid, but must either follow the slave himself, or be content with the price for which he was sold with interest, or with his present value and hire, of which the former was given by the decree. This claim seems not to be resisted on the ground of lapse of time.

Upon scrutinizing the evidence with regard to the value of the hire of the slaves, we think it authorizes the amount decreed, if the complainants were entitled to the hire for the entire period after the death of their mother. But, as their claim for a part of this period is barred by the statute of limitations, the decree is for too large a sum to each of the complainants.

Wherefore the decree, so far as it relates to the sale of the slaves and the distribution of the proceeds is affirmed, but so far as it decrees the payment of money by the defendant, John H. Prescott, to the complainants, it is reversed, as being for greater sums than are recoverable under the plea of the statute, and the cause, as to that branch of it, is remanded with directions to ascertain and decree to the complainants, respectively, their portions of the price of George, with the interest thereon from the death of Chloe Prescott, the devisee for life; and also their portions of the hire of the other slaves for the period above indicated, commencing five years before the institution of this suit.

J. & W. L. Harlan for plaintiff; *B. & A. Monroe* for defendants.

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COVENANT. **Commonwealth for Bell *vs* Hammond, &c.**

Case 19. ERROR TO THE SIMPSON CIRCUIT.

Administrators and Guardians. Sureties. Limitation.

December 19. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. THIS suit was brought against an administrator and his sureties, on his administration bond, by one of the distributees, as relator, for his distributive portion of the intestate's estate. The sureties filed a plea alleging that they were only the securities of the administrator, and were sued as such, and that five years had elapsed since the execution of the bond, and since the youngest of the heirs and distributees of the decedent arrived at twenty-one years of age, before the institution of plaintiff's action. To this plea the plaintiff replied, that the administrator had not settled his accounts with the County Court until within a period of five years next preceding the institution of his action. A demurrer to this replication was sustained by the Court, and a judgment rendered for the sureties in bar of the plaintiff's action; to which judgment the plaintiff prosecutes a writ of error.

The question in this case, arises under the act of 1838, (3 *Stat. Law*, 558,) limiting the time of bringing actions against sureties. The second section of the act provides, that from and after the first day of July, 1838, sureties, their executors, administrators, heirs and devisees, shall be discharged from all liabilities to distributees, devisees and wards, on administration and guardian bonds, when five years shall have elapsed without suit, after the youngest of the distributees, devisees, or wards have attained full age.

The question for decision. Is the plea good under this section, or should it have contained an averment, that at the time of the granting administration, and when the bond was executed, some of the distributees were under full age? It is contended

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that this section has no application where the distributees are of full age, as in this case, at the death of the intestate; that it only contemplates and provides for a case where some of the distributees are infants at the time of the execution of the administration bond; and that this plea is defective in not containing an averment that such was the fact.

The statute evidently contemplates a limitation to actions against sureties, on bonds and obligations of every description. The second section is the only one that applies to administration and guardian bonds. The third section, which is most general in its terms, only embraces all written obligations, other than those provided for in the first and second sections of the act. The only limitation which the statute provides to actions on administration and guardian bonds, is that of five years, contained in the second section. It must be regarded as applying as well to cases where the distributees are all of full age, as to those where some of them are infants when administration is granted; otherwise, the statute will provide no limitation in the class of cases first mentioned. In this class of cases, the suit must be brought within five years after the execution of the bond, because the distributees labor under no disability. In the other class of cases, five years are allowed after the youngest of the distributees have attained full age, on account of the disability of infancy.

The statute limiting the time for bringing suits against the sureties of administrators and guardians (3 *Statute Law* 558) was intended to be general, and applies as well to cases where the distributees were all of full age at the date of the bond, as to cases where part are of full age and part minors—where all are of full age at the date of the bond, suit must be brought within five years from its date. If part are infants, in five years from the arrival of the youngest to full age.

The limitation in the other sections of the act is seven years, and from this it is argued, that the Legislature did not intend, by this section, to shorten the time to five years, except when infancy intervened. But it may be remarked, in reply to this argument, that the section expressly applies to a case where the youngest distributee should attain full age one day after the execution of the bond, which would virtually reduce the limitation to five years. So that it may fairly be inferred it was the intention of the Legislature, in all actions against sureties on administration bonds, to make the limitation five years, the time, however, not to

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BANK OF U. S. vs LEATHERS.

commence running, where infancy existed, until the disability was removed.

As the plea, in this case, showed that more than five years had elapsed after the bond was executed, and also contained an averment that the action had not been commenced within five years after the youngest of the distributees had attained full age, it is a good plea, whether the distributees were all of full age, or some of them were infants, when the bond was executed.

A distributee has a right to bring suit against an administrator and surety on the administration bond whether a settlement has been made or not, after the lapse of nine months from administration.

The replication does not contain a sufficient answer to the plea. A distributee has a right to sue, whether a settlement has been made by the administrator or not. An administrator might not settle with the County Court at all, and if his failure to do so could prevent the operation of the statute, it would have but little efficacy in limiting the time of bringing actions against the sureties in his bond. A suit may be commenced by a distributee, for his share of the personal estate, against the administrator, at any time after the expiration of nine months from the grant of administration. The demurrer to the replication was, therefore, properly sustained.

Wherefore, the judgment is affirmed.

Green and *W. L. Underwood* for plaintiff; *Jones* for defendants.

ASSUMPSIT.

Case 20.

Bank of the U. S. *vs* Leathers.

ERROR TO THE CAMPBELL CIRCUIT.

Bills of exchange. Negotiable notes. Domestic bills of exchange. Protest. Evidence.

December 19. JUDGE GRAHAM delivered the opinion of the Court.

Case stated.

THE note of Jennison was executed by him for the purpose of raising money for his use, and Leathers and Goodman endorsed it for his accommodation alone. Not having been paid at maturity, it is attempted in this

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suit to make Leathers liable as indorser. The note is dated 22d August, 1820, payable at the office of discount and deposit of the United States Bank at Cincinnati, sixty days after date. By the laws of Ohio, (the place where this note was made and payable,) it is enacted that a demand made of the maker, drawer, or obligor, (of such a note as the one which is the foundation of this suit,) at the time when the note shall become due, or within a reasonable time thereafter, shall be adjudged due diligence, &c.

The proof in this case, relied on as evidence of a demand, consists solely of a protest of a Notary Public, copied into the record, which states, in the usual form of such documents, that on the 24th October, 1820, he attended at the Bank and demanded payment of the note, and no payment was made, &c. The Notary's deposition is taken, and he proves, *not* that he made a demand, but merely that the paper (the protest) attached to his deposition is his notarial protest, and that he gave notice, in writing, of the non-payment of the note to the endorsers.

The protest of a domestic bill of exchange is not required by law, nor is a certificate of a notary of such protest evidence of itself of dishonor.

It has been decided by this Court, in *Taylor* vs *Bank of Illinois*, (7 *Mon.* 577,) and *Whiting* vs *Walker*, (2 *Ben. Monroe* 262,) that such a protest on a domestic bill of exchange, is superfluous, unauthoritative, and no proof of the alleged dishonor of the bill. It cannot be regarded as any proof of the dishonor or non-payment of this note. But it is attempted to make Leathers liable upon an alleged promise to pay made by him, within less than five years before the commencement of this suit in 1834. There is some evidence that Leathers was informed of the state of facts as presented by the Bank books, before he made the promise relied on, but there is no proof that he was apprised of the fact that he was released by the failure of the plaintiffs to take the steps necessary to make him liable. He is shown to have been, at the time of the endorsement, and was afterwards, a resident of Kentucky, and may possibly have supposed that by

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A promise by an endorser in ignorance of the fact of his exoneration from liability is not binding.

the Ohio laws he would be responsible. A promise made by an endorser, in ignorance of the fact that he was not bound by the endorsement, has often been held to be without consideration and not binding. The promise certainly is not made more binding, in this case, by the fact that Leathers, at the time he made the promise, was released by lapse of time, ten years at least having intervened between the time when the note fell due and the time of the supposed promise.

Not perceiving any error in the proceedings of the Circuit Court, the judgment is affirmed.

J. T. Morehead and *L. Hord* for plaintiff; *J. & W. L. Harlan* for defendant.

CHANCERY.
Case 21.

Bank of Kentucky *vs* Vanmeter.

ERROR TO THE BUTLER CIRCUIT.

Judicial sales. Appeals. Decrees.

December 20. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

IN a suit in chancery which had been instituted in the Warren Circuit Court, by Elrod against McFaddin and others, and in which a priority of lien on the lands of McFaddin was claimed by Vanmeter, and also by Briggs and others, as mortgagees, a decree was rendered postponing, to a considerable extent, the lien of Vanmeter to that of the mortgagees, and directing a sale of the land, and a disposition of the proceeds according to the provisions of the decree. That decree was afterwards reversed, upon a writ of error prosecuted by Vanmeter: (*see opinion*, 8 *B. Monroe*, 435.)

After the decree, Vanmeter having filed the opinion and mandate of this Court, obtained a rule against the President, Directors and Company of the Bank of Kentucky and Robert J. Foster, who were not parties to the suit previously, requiring them to show cause, on the third day of the next term of the Court, why restitution of the proceeds of the sale of the land, made by the Commissioner under and by virtue of the decree of

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the Circuit Court, which had been reversed, and which proceeds had been received by them, should not be made, and the same be paid over to the plaintiff in the motion. He also, at the same time, obtained another rule against the same parties returnable on the same day, to show cause why the sale by the Commissioner, and the purchase of the land by the defendants in the motion, should not be set aside and vacated, and a re-sale ordered.

He subsequently filed, in the cause, a petition which he called a supplemental bill, and to which he made the Bank of Kentucky and Foster defendants. In it he set forth, in detail, the previous proceedings in the suit in chancery, and alleges that he had prayed an appeal from the decree in the Circuit Court; that the Court had allowed him forty days to execute an appeal bond; and that the Commissioner, appointed in the decree to execute it, had, within the forty days allowed by the Court for the execution of the appeal bond, sold the land, reported the sale to the Court, which was confirmed, and a deed of conveyance executed to the purchaser. He also stated, that he had failed to execute the appeal bond, but afterwards prosecuted a writ of error and reversed the decree. He insisted that the sale having been made within the time allowed for the execution of the appeal bond, was void, as having been made without authority, and prayed that it might be set aside and a re-sale of the land decreed. He further stated that the Bank of Kentucky became the purchaser at the sale, and had sold the same land to Foster, the other defendant.

The Judge of the Warren Circuit Court being unwilling to adjudicate in the case, ordered a change of venue to the Butler Circuit Court. By the last named Court a decree was rendered vacating and annulling the sale, and directing the land to be re-sold. When the cause was heard, the motions on rule and the supplemental bill were taken up together. There is no evidence in the record that the rules had been served, nor was there any service of process on Foster on the supple-

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BANK KENTUCKY vs VANMETER.

mental bill, nor any answer filed by the Bank of Kentucky.

The cause, therefore, was not ready for hearing, and the proceedings are irregular and erroneous. There is, however, a radical error in the decree upon the merits, which may as well be noticed at this time.

The reversal of a judgment or decree does not affect a sale and purchase made under either during the time that the same was in full force and unreversed.

The doctrine is well settled, that the reversal of a judgment or a decree does not affect a sale and purchase made under either, during the time that the judgment or decree was in full force and unreversed. The only ground relied upon here to vacate the sale is, that when it was made the decree was not in force, but its effect had been suspended for forty days, being the time allowed for the execution of the appeal bond.

Unless, therefore, the order granting the appeal and giving time to execute the appeal bond, had the effect ascribed to it, and suspended the execution of the decree until the expiration of the time, this case falls within the general rule upon the subject, and the subsequent reversal of the decree does not authorize the order vacating the sale.

In the case of *Freeman & Ewell* vs *Patton*, (1 *J. J. Marshall*, 193,) it was decided that it was not illegal to issue an execution on a judgment on which an appeal had been prayed and granted, before the time had expired which was allowed the defendant to enter into an appeal bond. That granting the appeal did not, *ipso facto*, suspend the judgment, or prevent any proceeding for its enforcement.

A prayer for an appeal from a judgment or decree and the granting thereof does not have the effect of suspending execution thereof, even during the time allowed for executing the appeal bond.

Granting an appeal from a decree has no greater effect than granting one from a judgment. The decree is not suspended by it, unless so ordered by the Court, but remains in full force; any proceeding, under it, for its execution being liable, however, to be arrested by the execution of the bond. The party praying an appeal has it in his power, at any time within the given period, to suspend the force of the decree by entering into a bond as required. If the opposite party should, in the mean time, attempt its enforcement, he will be

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subjected to all the cost that may be incurred, in the event that the bond be executed.

There was no order, in this case, suspending the decree, but merely an order granting an appeal upon the execution of an appeal bond in forty days. The operation of the decree, therefore, had not been suspended when the sale was made under it, and its subsequent reversal did not affect the validity of the sale. The decree of the Court below on this point is, therefore, erroneous.

Vanmeter is no doubt entitled to the proceeds of the sale of the land, to the extent of his demands. But the mortgagees being the persons who, by the decree of the Court, were to receive the benefit of the sale money, and being ultimately liable for it, are necessary parties to any proceeding instituted by him for the purpose of obtaining it.

Wherefore, the decree is reversed and cause remanded for further proceedings, in conformity with this opinion.

Grider and *Helm* for plaintiff; *B. & A. Monroe* for defendant.

CHANCERY.

Case 22.

Adams, &c. *vs* Adams.

ERROR TO THE CHRISTIAN CIRCUIT.

Wills. Devises. Emancipation.

JUDGE GRAHAM delivered the opinion of the Court.

December 20.

Case stated.

THIS controversy depends upon the construction which ought to be given to the will of Nathan Adams, deceased. The will is dated 9th of February, 1835, and the testator died in November, 1845. The fourth clause and only portion of the will which bears on the question in issue reads thus: "It is my will that, after my death, all my negroes, viz: Mary, about 25 years old and her child, now about two months old; David, about 23 years; Jacob, about 21; Fanny, about 13; Frank, about 9; Henry, about 8; Edward, about 7; John, about

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ADAMS &c. vs ADAMS.

6; and Joel King, about 2, shall be and they are hereby declared to be free upon the following conditions: that they be placed under the care of my nephew, James Adams, who shall treat them humanely and allow them fair wages for their labor, and when they have earned money enough to pay their own and the smaller one's expenses, and to pay the passage of the whole to the colony on the coasts of Africa and support the whole for six months after their arrival there, then they are to be sent to that colony where they will be free, but should any, or all of them, refuse to go to Liberia, as aforesaid, each and all so refusing, are to remain slaves for life and belong to my nephew James Adams."

Between the date of the will and the death of the testator, the negro woman Mary had two other children, named James and William.

After the death of Nathan Adams, his nephew James took possesison of all the negroes, aforesaid, and kept them until his death. By his will he emancipates a negro man, (the only slave he owned, unless those in controversy be his,) and makes no allusion, in any part of his will, to any other slaves.

The executors appointed by the will of Nathan Adams having failed to act, Kelly was appointed administrator with the will annexed. He is also the executor of the will of James Adams, deceased. Kelly having refused to account for the young negroes James and William, the heirs and devisees of James Adams, exhibited their bill, in which they insist that James and William are slaves, and the executor should be required to distribute them. Kelly insists that, by the will of Nathan Adams, they are free, and makes them defendants to his cross-bill, which they, by a guardian, *ad litem*, answer, making their answer a cross-bill against the complainants, electing to go to Liberia, and asking a decree declaring them free.

A testator made his will in 1835, died in 1845. By his will he declared that all

A will being a written instrument intended to carry out, after a man's death, his desires and intentions at the time of making it, the leading rule in the construction of wills, is to ascertain what that intention was. To

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do this, the object and motives which influenced him to make a will are entitled to much consideration, and to ascertain that intention, the Court should not be confined, either to strict grammatical construction, or to the literal import of the language used. No one can read the will of Nathan Adams, without coming at once to the conclusion, that it was his intention to emancipate all his slaves. He sets out with the declaration that all his negroes shall be free after his death, and then naming every one, old and young, even down to one about two months old; enjoins his nephew to treat them humanely, allow them fair wages for their labor, and when they (the negroes named in the will) have earned money enough to pay *their own* and the *smaller ones* expenses and their passage to Liberia, and support the *whole* for six months, they are to be sent to that colony. These expressions, we believe, indicate, beyond doubt, that the testator intended that all the slaves he might own at his death should be free. It would be exceedingly difficult to suggest a satisfactory reason why he should free all that were in being, and in the same instrument, which so clearly developes his benevolent feelings towards his slaves, should intend that after born children of the manumitted mother, should be separated forever from that mother's care.

The testator's declaration, during the ten years which elapsed from the date of the will to his death, cannot, perhaps, be used to elucidate the meaning of his will, but it is not improper to say, that, at least, *he* ever afterwards acted under the belief that the will freed all his slaves. Upon the whole case, we are of opinion that the Circuit Court did not err in decreeing that the said James and William are free on condition of going to Liberia. The complainant's bill was properly dismissed. There was no error in refusing permission to file his amended bill, bringing other parties before the Court. Should any of the slaves refuse to go Liberia, the complainants will not be precluded from asserting any claim they may have to them as slaves.

his slaves, naming them, "shall be and they are hereby declared to be free" (upon condition that they should elect to go to Liberia) be placed under the care of the testator's nephew, until a fund to pay their passage and sustain them six months in Africa should be raised. Two children were born between the date of the will and the death of the testator. Held that the after born children had the same right of election as those in being at the date of the will.

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Hooser vs Hays.

The decree of the Circuit Court is therefore affirmed. *Wooldridge* and *Stites* for plaintiffs; *Gray* for defendant.

Replevin.

Case 23.

Hooser *vs* Hays.

Appeal from the Christian Circuit.

Pleading. Replevin. Disseizen. Re-entry.

December 20. Judge Graham delivered the opinion of the Court.

The case stated.

This is an action of replevin by Hooser to recover possession of one hundred bushels of wheat, in the sheaves, averred to have been wrongfully taken and detained by Hays. On the trial, the defendant filed four pleas. Uupon the first plea, not guilty, issue was taken; but to pleas numbered 2, 3, 4, the plaintiff demurred, and the Court having sustained the pleas, and the plaintiff failing to make further replication, judgment was rendered for the defendant, on the verdict of a jury, sworn to inquire of damages. The sufficiency of these pleas to bar the plaintiff's action, is now to be determined.

It is only necessary to notice plea No. 3, which avers that the defendant was and is seized in his demesne, as of fee, of and to the use, trust, and profits, of a certain close, (describing it,) and being so seized, the plaintiff with force and arms broke and entered into the said close, and ousted and dispossessed the defendant out of and from his said close, and tortiously took possession thereof, and sowed the same with and in wheat; and whilst the same wheat was growing on the said close of defendant, of which he was and is so seized, as aforesaid, and before the said wheat was cut and severed from the said close, defendant re-entered into the said close, as lawfully he might and had a right to do, and was thereby in of his former right and title, and of his old estate in the said close; and being so in, and upon the said close, he cut and severed the said wheat, so

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sown by plaintiff and growing thereon, as lawfully he might, which said wheat so sown by plaintiff and growing on the said close of defendant, and cut and severed from the said close, by defendant, is the same wheat in plaintiff's writ and declaration mentioned, &c.

This plea avers title in fee in the defendant, possession and use by him, that the plaintiff tortiously entered and forcibly dispossessed him, sowed the ground with wheat, and afterwards the defendant re-entered. It is said: "If a a disseizor sow the ground and sever the corn, and the disseizee re-enter, he shall have the corn, because he entereth in by a former title, and severance or removing of the corn altereth not the case, for the regress is a continuation of the freehold in him, in judgment of law, from the beginning: (1 *Coke inst. sec.* 68. 55 *b.*

"If a disseizor sow the ground and sever the corn and disseizee re-enter, he shall have the corn because he entereth by a former title."

The plea presents a state of facts, which, if true, (as they are on demurrer taken to be,) shows that the defendant was the owner in fee of the land on which the wheat grew, and that after disseizen he had re-entered, and was in the actual and lawful possession of the land and of the wheat, as his own property, and was entitled to the possession thereof. If these things are so, then the plaintiff had not right to the immediate possession of the wheat, and could not maintain the writ of replevin: (3 *Stat. Law*, 503, 4 *J. J. Mar.* 255, 10 *S. & R.* 114.

The third plea seems to be a good bar to plaintiff's action. The demurrer to it was properly overruled, and the plaintiff having abided by his demurrer, the Court did not err in giving judgment for defendant.

The judgment of the Circuit Court is therefore affirmed.

Grey and Stites for appellant; *B. & A. Monroe and J. & W. L. Harlan* for appellee.

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DEBT. **Litsey and wife *vs* Smith's Administrators.**

Case 24. APPEAL FROM THE WASHINGTON CIRCUIT.

Administrators and heirs. Abatement.

December 21. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

In suits against heirs it is proper to abate against such as are not inhabitants or not found, as in cases of suits against joint or joint and several obligors.

THIS action of debt was brought by the administrators of George Smith, against the heirs of Bigger I. Head, to recover the amount of a note of said Head for $200, due in 1819. The action was commenced in January, 1848, against all the heirs, five in number, but was abated, upon the Sheriff's return, as to all except Litsey and wife, of whom the latter was one of the children and heirs of Head. And the jury having found that real estate had descended to her of value greater than the debt, a judgment was rendered against Litsey and wife for the whole. This is now complained of as an error in the proceedings, and was probably the ground of the motion in arrest of judgment. But, as in virtue of the subjection of real estate to the payment of debts, and of the remedies allowed against heirs for coercing out of that estate the debts of the ancestor from whom it has descended, they are to be regarded as jointly, or jointly and severally, bound, to the extent of such assets, it has been the practice to regard the case of heirs thus bound as coming within the same rule of proceeding which is authorized in all other cases of joint obligations, and which allows an abatement as to those who are returned as "no inhabitants" or "not found," and a judgment against the others upon whom process has been served. And whatever hardships may result from the rule in particular cases, it is no greater in the case of heirs than in the case of other co-obligors, of whom one alone may, in the first instance, be subjected to the entire debt, with no other remedy than that of enforcing contribution from his co-obligors, which one heir may also do against his co-heirs.

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By the first section of the act of 1819 (*Stat. Law* 780) suit may be brought against the heirs of an obligor after judgment and a return of no assets against the administrator; no suit for a *devastavit* or bill of discovery against the administrator is required.

But the material questions presented in the case, grow out of the fact that this action is brought against the heirs alone, after an ineffectual suit against the administrators of Bigger I. Head, their indebted ancestor. The declaration, after setting out the note, shows that a suit had been brought upon it against the administrators of Head in 1831, and that, on a judgment obtained in that year, an execution was issued in due time on which the proper officer had returned, in substance, that there was no property in the hands of the administrators to satisfy the judgment. A recurrence to the first section of the act of 1819, (*Stat. Law*, 780,) which authorizes a separate action against the heirs or devisees, in the cases therein stated, will show that these averments bring the case within the statute, which makes no reference to the time within which the suit against the personal representatives, or the subsequent one against the heirs, is to be brought. It merely authorizes the second suit, "if it shall appear, by a judgment of record, or by the return of the proper officer, that there is no property of the deceased in the hands of the executor or administrator to satisfy the first judgment." It does not require the plaintiff to seek satisfaction out of the personal estate within any particular period, nor in any other manner than by judgment and execution. It does not drive him to a bill of discovery, nor to an action for a *devastavit*; nor does it make a *devastavit*, by the administrator, a bar to the action against the heirs; nor does it interfere, in any respect, with this latter action, or with the principles which are to govern it, further than to require that it shall appear as above, that there is not property of the deceased in the hands of the administrator, &c., and to declare that the judgment in the first action, if not satisfied, shall be no bar to the second. The whole effect of the statute is, that, under the circumstances therein stated, the creditor may sue the heirs &c. alone, just as he might do under the second section of the act, if there were no administrator; and with the same right of recovery as to them, as if he had sued them with the administrator,

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LITSEY & WIFE vs SMITH'S ADM'RS

or as if he had sued them alone for the want of an administrator. In any of these cases, the heirs may, in defence of the action against them, not only rely upon no assets having descended to them, but may deny the justice of the demand in its origin, or insist that it has been paid or otherwise discharged. But we do not perceive that they can defeat the action on the ground of any delay or *laches* in pursuing the creditor's remedy against the personal estate, unless they might do so by showing that the delay was fraudulent, or at least injurious to them. There is no presumption as between the creditor and the heirs, that the administrator has committed a *devastavit*, because when he is sued by the creditor, it appears that he has no assets. Under our statutes he is not bound to plead *plene administravit*, though it be true, and a return of *nulla bona* after a judgment by default, is not evidence of a *devastavit*, even as between him and the plaintiff. If, in the action brought in 1831, nine years after the death of the debtor and the grant of administration on his estate, his heirs had been sued jointly with his administrators, the former could not have resisted a recovery against themselves on the ground of the delay in bringing the suit; and if, in proceeding by *fi. fa.* on the judgment against the administrators and heirs, no assets were found in the hands of the administrators, the lands descended to the heirs would have been immediately liable to seizure and sale in satisfaction of the judgment. This being so, it seems unreasonable to suppose that the same delay which would have been unavailing to protect the heirs in the joint remedy against the real and personal estate, should be available for their protection, when the first suit is against the personal representative alone, and on that remedy being found ineffectual, the separate action against the heirs is resorted to for reaching the real estate descended to them.

Such action cannot be defeated by the heirs by reason of any delay in pursuing the personal representatives unless it was fraudulent.

The law, it is true, regards the personal estate as the primary fund for the payment of debts, and gives access to the real estate only upon the usual evidence of the failure of the primary [illegible]. But it makes the creditor

The personal estate is the primary fund for the payment of debts

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in no way responsible for the due administration of the personal assets; and founds his remedy against the real estate upon the fact alone, to be ascertained by a return of *nulla bona*, that the primary fund has failed to satisfy his debt. He may, indeed, investigate the causes of the failure, and enforce, as a means of satisfaction, the personal responsibility of the administrator for an improper administration of the assets. But he is not bound to do so for the benefit of the heirs, who have their own remedies against the personal representative, and have no right to look to the creditor for the protection of their interests.

—but the creditor, when both heir and administrator are sued, and *nulla bona* is returned as to the administrator, is not bound to investigate the correctness of the administration; but may have satisfaction out of the real estate.

As in the absence of all proof, there is no presumption that the administrators appropriated the assets in their hands to their own personal use, without benefit to the estate, the failure of the remedy against the personal estate, in the present instance, is *prima facie* to be attributed to the presumed fact that, in the interval of nine years from the grant of administration, the assets had been exhausted in payment of other debts, or by appropriation to the distributees. And although, if there were no real assets, the creditor might, in consequence of his delay, be driven to his action for a *devastavit*, and be subjected to the loss of his debt if the assets had been duly administered, there is no ground, either in justice or in law, for saying that he shall forfeit his remedy upon the real assets, because he has allowed the administrator an opportunity of either paying other debts in preference to his own, or of distributing the assets before his debt is satisfied. Nor, indeed, do we perceive that such a consequence should follow from the mere delay or *laches* of the creditor, if it should even appear that the administrator had not paid out the assets to other creditors, or to the heirs who are themselves distributees, but had appropriated them wholly or in part to their own use.

The law furnishes to the heirs the same securities and as efficient remedies for protecting their interest, against the mal-conduct of the personal representatives as it furnishes to the creditor. If both are equally in-

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nocent of any participation in the acts from which loss or injury may result, there is surely no reason for throwing the loss upon the creditor, whose claim is founded upon a just equivalent, for the benefit of the heirs who are mere volunteers. And we are of opinion, that where the creditor has been merely passive, and has neither caused the mal-appropriation, nor impaired the remedy of the heirs for the injury to them, his legal remedy against the heirs is not affected by the mere fact that he postponed his remedy against the personal estate until after it had been wasted. But be this as it may, the real estate is certainly not discharged from its liability by the mere delay, unless it appear, that in consequence of that delay, there has been a mal-appropriation of the personal assets, without benefit to the heirs; and even then, we are inclined to the opinion, that it must appear that the remedy of the heirs has been materially injured by the delay.

So far then as time is concerned, there was as much diligence used in this case, in the remedy against the administrators, as the statute requires. And the Court certainly committed no error to the prejudice of the defendants in the action, after saying to the jury that an honest, *bona fide*, effort to collect the debt from the personal representatives was necessary; in telling them further, that the judgment and return are *prima facie* evidence of diligence. They are conclusive evidence of all the dilgence required by the statute. And if, as the jury were also told, and as they were authorized to find, the administrator disposed of the assets by paying debts, or by distributing them to the heirs, the plaintiff was entitled to recover in this action, notwithstanding his delay in suing the administrators. The jury having found that the assets were thus disposed of, and there being no pretence that this debt has ever been paid, there is no ground in the merits of the case for disturbing the verdict or the judgment. We should, however, notice the agreement of 1827, between the committee of the creditor, who was then a lunatic, and the administratrix of Head, and her then husband, to

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the effect that the former would not urge the collection of the debt during the life of the lunatic, and would endeavor, after his death, to have it satisfied out of that portion of his estate which should come to the administratrix, (who was his sister,) or to her children, the heirs of Head. And we remark that, although it may account for the delay in suing the administrators, and in the subsequent proceeding against the heirs, which was not commenced until after the effort to settle the debt, in the manner agreed on, had been ineffectually made, (see *Hardin, &c.* vs *Smith's executors*, 7 *B. Monroe*, 390,) this arrangement was *prima facie*, and indeed avowedly, for the benefit of the heirs. And if under color of this arrangement, the administratrix, or the administrator, misappropriated any part of the assets to the injury of the heirs, it devolved upon them to show it, which they have wholly failed to do. On the contrary, not only was the arrangement not obligatory upon the administratrix, but it may be inferred from the evidence that the assets had been appropriated before it was made, and this inference would have been strengthened by the evidence (improperly excluded) that Bigger I. Head was largely indebted at his death. This agreement was, moreover, a fact before the jury, and they have found, upon the whole evidence, how the assets were disposed of. The court did not err in refusing the instruction asked for in reference to this agreement. Nor was the knowledge of the creditor, that the administrators had assets which was referred to in the same instruction, in any way material to the law of the case.

The case of *Buford* vs *M'Kee's executors, &c.*, (3 *B. Monroe*, 224,) referred to in argument, does not relate to the legal remedy given by the statute against heirs, but to the creditor's right to go into equity for the purpose of subjecting land in the hands of the heirs of the devisee of his debtor, which was denied under the circumstances of that case. The principles of the present opinion apply to the statutory legal remedy. But if this were a case in equity, the heirs have not shown

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the equitable grounds for resisting the enforcement of the claim against them, which appeared in the case referred to, and on which that case seems to have been decided.

Wherefore the judgment is affirmed.

R. J. Browne for appellants; *J. & W. L. Harlan and Ballinger* for appellees.

CHANCERY.

Case 25.

Hite *vs* Campbell.

ERROR TO THE LOGAN CIRCUIT.

Principal and Surety. Trusts. Jurisdiction.

December 21.

JUDGE GRAHAM delivered the opinion of the Court.

A security may proceed against his principle in chancery for reimbursement of money paid as surety. So may the assignee of the surety if the surety be made a party.

THE note of Joseph Hite, John S. Hite, and Hodges, (the two latter being sureties for the first,) having been fully paid and discharged by Hodges, to whom it was delivered by the payee, and his name afterwards torn from the note, could not be resuscitated by any sale thereof, by Hodges, to one of the payers, so as to make it again a note, binding and valid as such, against the other two obligors. Hodges, the surety, having paid the debt of his principal, had a right of action against his principal for the amount so paid, and might assign his demand so as to authorize Campbell to use Hodges' name in an action at law, to recover the amount paid. And, as the surety may sue the principal in chancery, we suppose his equitable assignee may maintain, in his own name, a suit in equity against the principal; but in such a suit the surety, Hodges, is an indispensible party, and on being made such, the principal would have an opportunity of relying upon such defence as he may have against the surety, to resist a decree against him. Hodges was, by an amended bill, prayed to be made a party, but no process was executed on him, nor was any warning order had against him. He was not before the Court as a party. Although no assignment or transfer of Hodges' demand against Hite, is ex-

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hibited by Campbell, yet, if the facts exist as stated in his amended bill, he was was authorized to institute this suit.

The decree must, however, be reversed for want of proper parties; but as the case must be sent back for further proceedings, it is proper to suggest the decree which ought to be rendered herein if it shall be proper to decree for the complainant. By the will of Samuel Hite, one fifth of his land, and also one negro woman, was devised to John S. and James C. Hite, "to be held by them for the benefit of Joseph Hite, allowing him a reasonable compensation for the use of the land and negro yearly." The rent of the land and the hire of the slaves would, in a short time, realize enough to pay the demand set up by complainant, and where that can be done, in a convenient and reasonable time, it is proper so to decree, rather than to subject to sale the entire estate, and thereby deprive the *cestui que trust* of all future benefit from the property. If the complainant, on the return of the cause, shall show that he is entitled to a decree against Hite, such decree, for the reasons above suggested, should only be, to apply to his own demand, the annual profits of the estate devised, until the whole is paid.

For the reasons suggested, the decree of the Circuit Court is reversed and the cause remanded, with directions for other proceedings consistent with this opinion.

E. M. & H. Q. Ewing for plaintiffs; *B. & A. Monroe* for defendant.

Hawkins, &c. *vs* Moffitt.

CHANCERY.

ERROR TO THE WOODFORD CIRCUIT.

Case 26.

Fraud.

JUDGE GRAHAM delivered the opinion of the Court.

December 21.

MOFFITT, a judgment creditor of James M. Talbott, brought this suit to reach the estate of his debtor in the

Case stated.

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HAWKINS, &c. vs MOFFITT.

hands of John G. Talbott and Hawkins. It appears, by the answers of the defendants, that on the 21st January, 1847, John G. Talbott, for a balance due on settlement, executed his note to defendant, James M. Talbott, for the sum of $1169, payable 1st June, 1847, who, shortly after its execution, transferred it to Hawkins. The subpœna in chancery was executed on the Talbotts in March, 1847, and they were, by endorsement on it, notified that the object of the bill was to enjoin and restrain John Talbott from paying to his co-defendant, James, or any one for him, the sum of $725, until the hearing of the bill. Notwithstanding this warning and notice, John Talbott, on the 6th of July, 1847, paid to Hawkins $600, in part of said note.

One greatly indebted sold all his interest in his grandfather's estate, worth $1160. for $475 & ten years boarding in future. Held that such contract was fraudulent.

Hawkins, in his answer to an amended bill, exhibits a written contract between himself and James Talbott, purporting to have been made a short time before the action at law was commenced by Moffitt, by which contract, Talbott sold to Hawkins all his interest in his grandfather's estate, (which Hawkins states consisted of the aforesaid note,) in consideration, "the said Hawkins, is to give up to Talbott, notes he holds against him for upwards of $400, and is to pay a note to Curd for $75, and Hawkins is to board the said Talbott ten years, or so long as the said Talbott remains single and agrees in the family; if he leaves Hawkins, then Hawkins is not bound to pay any other boarding." Hawkins is also to furnish Talbott in such clothes, as Hawkins may think suitable, for five years.

Hawkins, it is true, sets up in his answer, that he has demands against Talbott beyond those named in the agreement. That being in writing, is the best evidence of the contract between the parties, but is not conclusive of the amount of indebtedness of Talbott to Hawkins. Be that as it may, the parol proof of payments or advances, &c., falls short even of the amount specified in the writing.

It is not necessary to advert particularly to the depositions in the cause. We think the defendant has shown by his own answer and exhibit, that the contract ought

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not to be sustained. A young man, embarrassed by debt, a careless spendthrift, (as is proved by a witness,) transfers an estate of $1169, for a consideration not exceeding $500, and for the further consideration of being maintained ten years. A debtor cannot be permitted thus to dispose of his estate to the hindrance and delay of his creditors. To sanction such contracts, would be virtually declaring that by agreements for future boarding, clothing, &c., for a term of years, long enough to exhaust all the debtor's property, almost every creditor may be precluded from coercing the collection of his demands. The transaction is manifestly fraudulent, and ought to have been so declared, instead of being sustained, as it was in part at least, by the decree of the Court. If the transaction was in good faith, and not fraudulent and void as to creditors, it was improper to compel Hawkins to board and clothe Talbott, and at the same time be required to pay the complainant the value of that boarding and clothing. We think, however, that as to the complainant, in this suit, the contract should be held to be void. As Talbott made payment to Hawkins after the service of process on him, and in total disregard of the legal warning not to pay, he might well be subjected to a decree for the entire amount of the complainant's demands against James M. Talbott. Certainly he should be decreed to pay the residue of his note and interest remaining due, after deducting the $600 paid to Hawkins; and Hawkins should be decreed to pay so much of the complainant's debts, interest, and costs, as may remain due to him, after deducting the amount to be decreed against John G. Talbott.

This Court does not regard the settlement of Hawkins, as guardian, which has been brought up by *certeiorari*, as entitled to any consideration in this case. Although that settlement may have been among the papers of the cause, it is not made an exhibit in any of the pleadings, nor is there the slightest allusion to it in any part of the record. If parties desire to use such documents, it is their business to see to it, that they are so presented, or used, or referred to, in some way in

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DUDLEY vs PRICE'S ADM'R.

the Court below, as to permit the Clerk to copy them in making up his record for this Court.

But for the reasons suggested in this opinion, the decree of the Circuit Court is reversed, upon the original and cross-errors, and the cause remanded to that Court with directions to render a decree in conformity with this opinion.

Morehead & Reed and *T. P. Porter* for plaintiffs; *J. & W. L. Harlan* and *U. Turner* for defendant.

10m 84 91 521
10bm 84 d113 722
10bm 84 123 158

CHANCERY.

Case 27.

Dudley *vs* Price's Administrator.

APPEAL FROM THE FAYETTE CIRCUIT.

Equity jurisdiction. Corporations. Equitable interests. Limitation.

December 22. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

PRICE'S administrator exhibited his bill in the Fayette Circuit Court, against the President and Directors of the Railroad Company, and Dudley and others, in which he alleged that he had recovered a judgment in the Jefferson Circuit Court, against the Lexington and Ohio Railroad Company for $1504 37, and interest and cost thereon, upon which an execution had been duly issued and returned no property found. He further alleged that the defendants were stockholders in said corporation, and had received dividends upon their stock when there were no actual profits to divide, and when it was illegal and improper to declare such dividends. He, therefore, prayed that so much of said fund in the hands of defendants, as stockholders, might be decreed to him, as would pay and satisfy his judgment at law.

The statute of limitation was relied upon in defence, and also that the fund in the hands of the stockholders belonged to the State of Kentucky, by virtue of certain mortgages, which had been executed by the corporation, and therefore, could not be appropriated to the payment of the complainant's demand. It was also

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contended, that the company, having conveyed to the State the road itself and all her property, and having surrendered all her corporate rights and privileges, was, in law and in fact, dissolved, and had no corporate existence whatever; and that, consequently, the suit could not be maintained, or any decree rendered in favor of the complainant.

Decree of the Circuit Court.

The Circuit Court rendered a decree against Dudley, in favor of the complainant, for the whole amount of the dividends which had been paid to him within five years before the institution of the suit. From that decree Dudley has appealed to this Court.

Upon an examination of the deeds of mortgage, relied upon as having transferred the fund in contest to the State, we are satisfied that it is not embraced by them, and that the State has no interest in it under those deeds.

But, by those deeds, the corporation conveyed to the Commonwealth of Kentucky all its interest in the road, and all its rights and privileges under its charter, which was done by legislative authority. Having failed to pay the debt for which the State was bound, and for whose indemnification the mortgages had been made, a sale of every thing included in the mortgages was made, and the State of Kentucky became the proprietor thereof, with all the rights and privileges of the company. This sale and conveyance was legal and valid, as decided in the case of *Harrison and wife* vs *Lexington and Ohio Railroad Company*, (9 *B. Monroe*, 472.) The original company having thus surrendered the right to construct the road, and destroyed the end for which it was incorporated, was, by operation of law, dissolved, and had no further corporate existence or capacity.

The dissolution of a corporation does not have the effect to dissolve its contracts, and creditors may enforce their claims against any property of the cor-

It does not follow, however, that by the dissolution of a corporation, its contracts are dissolved. The obligation of the contract survives, and the creditors may enforce their claims against any property or estate belonging to the corporation, which has not passed into the hands of *bona fide* purchasers: (8 *Peters*, 281.) In

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poration which may not have passed to *bona fide* assignees.

this case, the dissolution did not occur until after the complainant had instituted his suit, and if he acquired a lien upon the fund in the hands of the stockholders prior to that time, a Court of Equity should certainly enforce it, as, otherwise, he would be without remedy.

That the dividends were declared by the Directors when there existed no actual profits to divide, appears to have been established by the Commissioner's report on file. No execution seems, however, to have been issued upon the complainant's judgment at law, and as he failed to bring his case within the statutes subjecting choses in action, by the interposition of a Court of Equity, to the payment of a judgment upon which an execution has been returned no property found, the question arises, whether the Court has jurisdiction to afford him any relief.

This bill was evidently framed with a view to relief under the statutes subjecting choses in action to the payment of a judgment upon which an execution had been issued, and had proved unavailing. But although it was framed with that view, it contains allegations sufficient to show that the fund which was distributed among the stockholders under the name of profits, was, in reality, a trust fund in the hands of the Directors for the payment of debts, and should have been retained by them for that purpose. It contains, however, no charge of fraud, and cannot be sustained under the act of 1838; (3 *Stat. Law*, 116,) to provide against the fraudulent disposition of property, to the prejudice of creditors.

The capital stock of the Lexington and Ohio Railroad Company held to be a trust fund in the hands of the Company, and liable to the payment of its debts.

It seems to be very clear, upon general principles, that the capital stock of the Railroad Company, and also its profits, should be regarded as a trust fund for the payment of its debts and liabilities, and that the stockholders were only entitled to such surplus as might remain after their payment. Being a trust fund, it may be followed by the creditors into the hands of any persons who received it with notice of the trust, and as to the stockholders themselves, they must be considered as affected with the most ample notice: *Wood et*

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al. vs *Dummer et al.*, (3 *Mason*, 308; 2 *Story's Equity*, 496.)

To subject such fund it is necessary that a creditor show that the legal remedies had been used ineffectually.

But the question still occurs, whether the complainant's bill makes out a case which, upon the facts admitted or proved, entitles him to relief. If it does, it must be simply on the alleged fact, that the defendant, Dudley, has the fund, or part of it, in his possession. Although the complainant has obtained a judgment at law, he has failed to show that the usual remedy by execution was ineffectual. He has not alleged that the corporation is insolvent, or that there was no property belonging to it liable to execution, or that the corporation is dissolved, or that any other obstacle exists to his legal remedy. The mere fact that the fund is a trust fund for the payment of the debts of the corporation does not authorize an application to the Chancellor to follow it into the hands of the stockholders, and to decree its payment over to a creditor, unless facts are alleged which show that his legal remedy would be unavailing, and the interposition of a Court of Equity necessary to enable him to obtain the payment of his demand: (3 *Mason's Reports*, 314.)

In the case of *Gratz* vs *Redd*, (4 *B. Monroe*, 178,) the complainant, before he filed his bill, had obtained a judgment at law, upon which an execution had been returned no property found. He also alleged in his bill, that the corporation had no property or estate liable to execution, and made it manifest that his only remedy was in a Court of Chancery. The reasoning of the Court, therefore, in favor of the jurisdiction of a Court of Equity, must be regarded as having reference to these facts, and the condition of the parties as they stood in that case.

The complainant's bill not having made out a case which entitles him to the aid of a Court of Equity, the next inquiry is, whether the defect can be supplied by the statements in the defendant's answer? Where a discovery is sought, or from the character of the transaction, or the attitude of the parties, it may be fairly presumed that the defendant's means of information

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DUDLEY vs PRICE'S ADM'R.

are better than those of the complainant, the matters stated in the answer may be resorted to in aid of the defects in the bill. It may be doubted whether this case comes within the operation of this principle; as the condition and solvency of the company, and the ability of the complainant to collect his judgment at law, by execution, were matters, if not as much within his knowledge as that of the defendant, about which he might have procured the requisite information, without the exercise of more than reasonable diligence. But conceding that the defects in the bill might be supplied by the statement contained in the defendant's answer, that the corporation was dissolved, so as to give jurisdiction to a Court of Chancery still we are of opinion that the complainant was not entitled to any decree against the defendant Dudley.

If new matter be introduced into the pleadings in Chancery, the statute of limitation may be relied upon, and time computed up to the time of the introduction of such new matter.

The bill was filed in 1841, but no answer was put in by Dudley until 1848. If, when the answer was filed, the complainant had filed an amended bill, alleging the dissolution of the company, and his consequent right to apply to a Court of Equity for relief, the statute of limitations, plead and relied upon by Dudley at the same time, would have barred the relief sought. Until the filing of such an amendment, the Court would have had no jurisdiction, and until the Court acquired jurisdiction, the statute continued to run. Upon the same principle if, during the pendency of a suit, any new matter or claim, not before asserted, is set up and relied upon by the complainant, the defendant has a right to insist upon the benefit of the statute until the time that the new claim is presented, because, until that time, there was no *lis pendens*, as to that matter, between the parties. Besides, in this case, the dissolution of the corporation did not occur until five years had expired, from the time the fund in contest was received by Dudley. And certainly the complainant cannot claim to be in a better position, by aid derived from the defendant's answer to supply the defects of his bill, than he would be, had he supplied the defects himself by an amended bill filed for the purpose; in which

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event we consider it clear, that the defendant might have availed himself of the time which had previously elapsed, inasmuch as there was, until the amendment had been filed, no case before the Court of which, upon the pleadings and proof, it had any jurisdiction.

And if the demand had not been barred by the statute of limitations, the decree rendered was for a greater amount than, according to the equity of the case, the complainant was entitled to. This bill showed that dividends had been received by the other stockholders, and contained no allegation showing any reason why the whole of the fund in Dudley's hands should be applied to the payment of his demand. He did not allege that the other stockholders were insolvent and unable to contribute their proportion, or that other debts existed against the company sufficient to exhaust the fund in the hands of the other stockholders, or any other circumstances denoting an equity against Dudley, to contribute towards the payment of his demand, more than ratable proportion of the fund in his hands, to that which had been received by the other stockholders. But according to the view which we have taken of the effect of the statute of limitations, the complainant was not entitled to any decree against Dudley.

Wherefore the decree is reversed and cause remanded with directions to dismiss the complainant's bill.

W. A. Dudley for appellant; *Robinson & Johnson* for appellee.

Floyd *vs* McKinney.

EJECTMENT.

APPEAL FROM THE UNION CIRCUIT.

Case 28.

Sheriff sales of land. New trial.

JUDGE GRAHAM delivered the opinion of the Court.

December 22.

THIS is an action of ejectment. On the trial, the plaintiff introduced and read to the jury, 1st, a judgment recovered by him against the defendant for the sum of $85 72; 2d, an execution which issued on said

Case stated and decision of the Court.

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FLOYD vs McKINNEY.

judgment, and which was returned "levied and replevied;" 3d, a replevin bond executed by defendant, with security, to pay the amount of the execution; 4th, an execution which issued on the replevin bond, and which, by the direction of the defendant, endorsed on the excution, was levied on the tract of land in controversy, and which land, as appears by the Sheriff's return on the execution, was sold by him, and purchased by the plaintiff; 5th, a deed from the Sheriff for the land thus levied on, sold, and purchased.

Motion for new trial overruled.

On the defendant's motion, the Court excluded from the jury the Sheriff's return on the execution and the deed from the Sheriff to the plaintiff; and after this exclusion, then instructed the jury to find a verdict for defendant; and the jury having so found, a judgment was rendered for defendant. The Court having overruled the plaintiff's motion for a new trial, he has brought the case to this Court by appeal.

The decisions of the Circuit Court are attempted to be sustained upon the grounds that there is no valid judgment to sustain the deed, and the sale by the Sheriff was not made according to law.

It is admitted, by the appellee's counsel, that in this case it was not necessary to produce the entire record, but only so much thereof, as to show there was a valid judgment: (7 *Monroe*, 386.) The judgment copied into this record, does not show that process had been served on the defendant, or an appearance entered for him, but merely states "that the defendant being solemnly called, came not, therefore," &c.

But the case does not rest exclusively on the validity of the judgment, and it is not necessary to determine that question.

The production of a replevy bond and execution thereon is sufficient to uphold a sale of land by a Sheriff—and a purchaser, to make title, is not bound to go

It seems to us that the replevin bond upholds the sale. The statute provides, that after a replevin bond shall fall due, the proper officer shall at the request of the plaintiff, or his attorney, "issue execution thereon as on a judgment, and such bond shall have the force of a judgment, and be taken and treated as such:" (1 *Stat. Laws of Kentucky*, 643.) If this bond has the force of

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a judgment, then as the defendant voluntarily entered into it, he cannot, in this action, require the plaintiff to go behind the bond, and produce a valid judgment to sustain the bond. A sale, by virtue of an execution on the bond, is as valid as if it had issued on a valid judgment. If the replevin bond was defective, or was taken by the Sheriff without lawful authority, or if it was based upon an execution improperly issued on an invalid judgment, his remedy was to have it quashed, on motion, or, by other proceedings, annulled. He cannot be permitted to assail it in the action of ejectment against him.

Defendant cannot go behind the judgment on the replevy bond.

The next objection taken to the Sheriff's sale is, that it was not made according to law. To sustain this position, we are referred to *Patterson* vs *Carneal*, (3 *A. K. Marshall*, 619.) In that case a tract of 4,000 acres was sold for $370 to satisfy a debt of only $74. The Sheriff having sold so much more land than was necessary to pay the debt, the sale was held to have been unauthorized by law, and therefore void. In this case, however, the land was sold for barely enough to pay the amount of the execution, and no one would bid more. It is true the evidence conduces to prove that after the amount of the execution was bid for the land, the officer did not enquire whether any one would pay the debt for a quantity of land less than the whole tract. This omission was but a mere irregularity of the officer, not caused by any act or agency of the purchaser, and should not affect his title. This doctrine is held in the case cited, *Patterson and Carneal.*

The failure of a Sheriff in selling land where the amount of the execution is bid and no more, to offer less than the whole tract, is an irregularity in the Sheriff which will not affect the right of the purchaser who has no agency in such act.

We do not perceive any sufficient reason for excluding the evidence from the jury. If the evidence had not been excluded, it is clear that the instructions, as in case of non-suit, could not, and we suppose would not, have been given. In excluding the evidence, and instructions given to the jury, we think the Court erred, and ought to have granted the plaintiff a new trial.

The judgment of the Circuit Court is therefore reversed, and the cause is remanded with directions to

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ALBERT'S EX'RX vs BLUE.

set aside the verdict and judgment, and award the plaintiff a new trial without payment of costs.

B. & A. Monroe for appellant; *J. & W. L. Harlan* for appellee.

ASSUMPSIT.

Case 29.

Albert's Executrix *vs* Blue.

ERROR TO THE UNION CIRCUIT.

Pleading. Action on the case.

December 22. JUDGE GRAHAM delivered the opinion of the Court.

The case stated.

THE only subject of inquiry in this case is, the sufficiency of the plaintiff's declaration. The several counts are in assumpsit, and but one exception to the form or substance of either of them has been taken. It is insisted that the declaration is in *tort* upon a cause of action *ex contractu*. It commences by stating that the plaintiff complains of the defendant, "in custody &c. of a plea of trespass on the case, for that heretofore, &c." The modern form of declaring in assumpsit is, to begin the declaration by the words, "action of trespass on the case *on promises*," or words of like import. The precedents in *Chitty*, *Archbold*, &c., prescribe that form. Anciently, however, it was not so. Trespass on the case, in its most comprehensive signification, includes *assumpsit* as well as an action in form, *ex delicto*, (1 *Chit.*, 151;) and declarations formerly commenced with the words, "trespass on the case," omitting the words, *on promises*. It is true, in the cases referred to by the defendant's counsel, where a statute authorizes "an action on the case," it shall be understood to mean an action in *tort*, and not in contract, and we admit that where actions by name are spoken of, an action "on the case" should be construed to mean an action in *tort*. But we think it would be extending the rule too far to enforce it rigidly, to the mere form of the commencement of a declaration, and, while we do not deny that it is not only more in conformity with general usage,

A declaration in assumpsit is not demurrable commencing "A B complains of C D in a plea of trespass on the case" without adding the words "on promises," though the latter is the modern practice. Trespass on the case in its general and most comprehensive sense includes assumpsit as well as actions in form *ex delicto*. (1 *Chit.* 151.)

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but the better form of pleading, to insert the words, "on promises," we cannot concur in the suggestion, that the omission of these words constitute an objection sufficiently valid to sustain a demurrer. It is, at best, but a rigidly technical objection, not at all affecting the merits of the case, nor, in any manner, calculated to mislead the defendant as to the subject matter of the plaintiff's action. The objection taken, is not in a matter of substance; it is only one of mere form, and, under our statute regulating pleadings, should not have been regarded.

It seems to us, that the Court erred in sustaining the demurrer to the declaration.

The judgment of the Circuit Court is, therefore, reversed and cause remanded, with directions to set aside the judgment for the defendant, overrule the demurrer, &c., and for other proceedings not inconsistent with this opinion.

B. & A. Monroe for plaintiff; *J & W. L. Harlan* for defendant.

Duncan *vs* Monserratt, & Co.

CHANCERY. *Case* 30.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Set-off in equity.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

December 27.

ALTHOUGH the complainants allege the insolvency of Kellogg, Weissinger & Co., at the filing of this bill, they do not allege it as existing before notice of the assignment of their note by Kellogg to Duncan. And as, according to the principle settled in *Wathen, &c.*, vs *Chamberlaine*, (8 *Dana*, 164,) this fact is the essential ground of their equity to a set-off against the assignee of their note to Kellogg, their own demand against the firm of Kellogg, Weissinger & Co., the failure to state this fact, is a fatal defect in the merits of their claim, as addressed to the equitable consideration of the Chancellor.

An assignee of a note who has accepted the provisions of a deed of trust, made by the debtor, of all his property to satisfy creditors, has no recourse against the assignor on account of the insolvency of the obligor at the date of the assignment, nor any right to claim a set-off against the assignee, until the trust

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DUNCAN vs MONSERRATT &c.

fund is exhausted.

But if this defect were remedied, or if it be supposed that there is any thing in the pleadings of the complainants which may be taken as equivalent to the allegation of insolvency before notice of the assignment to Duncan, still we are of opinion that their claim to a set-off, by which the loss, if any, is to be thrown upon Duncan, cannot be allowed without a violation of the principles of equity, on which alone its allowance depends. They, in common with other creditors of K., W. & Co., have accepted the provisions of a deed of trust, whereby K., W. & Co. have conveyed all their property for the security and ultimate satisfaction of their debts, among which is that now offered to be set-off. It is this conveyance which, divesting them of their property, constitutes or causes their insolvency, except as to the debts provided for. And these debts will, as the trustee thinks, in a few years, and under such administration as the deed authorizes, be satisfied out of the means appropriated to their discharge. Then the case is, that as to Kellogg's responsibility to Duncan, he is certainly insolvent, and that, in part, by the concurrence of the complainants, and for the security of the very demand which they offer to set-off; but as to the complainants' demands against K., W. & Co., they are not certainly insolvent, and, perhaps, indeed probably, will not prove to be so under that test to which the complainants have assented. Suppose Kellogg alone had been their debtor, and that, before notice of the assignment of their note to him, they had, instead of claiming a set-off, taken a mortgage upon all of his property, to be void if their debt should be paid in three years, could they, on the ground that the mortgaged estate might possibly prove insufficient, and that there were no other means outside of the mortgage, claim that, in equity and good conscience, their demand should be set-off against their note in the hands of an innocent assignee, and that he should be subjected to the loss of his debt, or driven to assail their mortgage, or compelled to await the result of its foreclosure? We think they could not. And if, in the case supposed, or

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in that actually presented, the equity of the complainants should be deemed superior to that of the assignee, we are of opinion that, in this contest, to avoid loss, the loss should not be thrown upon the assignee, further than was necessary to serve their just demands, purged of usurious interest. But as for the reasons before stated, we think the complainants are not entitled to set-off claimed by them, therefore, the decree is reversed, and the cause remanded, with directions to dismiss the bill.

Duncan & Ripley for plaintiff; *Loughborough & Ballard* for defendants.

Beckwith *vs* Bent, Duvall, &c.

CHANCERY.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Case 31.

Rents. Mortgages.

JUDGE GRAHAM delivered the opinion of the Court.

December 27.

PENNY had leased of Beckwith the Franklin House, in Louisville, at the rate of $66 66⅔ per month. While in the occupancy of the house under the lease, he (in Jany. 1849) executed to the appellees, to secure the payment of certain sums of money owing by him to them, a mortgage on his furniture then in said house. He had no property on the premises except that embraced in the mortgage, and has not had any other property since that time. On the 15th March, 1849, suit was instituted by the appellees to foreclose the mortgage. Rent is due to Beckwith from 25th March, 1849, at the rate aforesaid. Beckwith claims a priority of lien on the property to pay the rent due to him; and it was agreed by the parties, "that the cause shall stand as if a distress warrant, for rent due at the date of the agreement, (June 1849,) were in force in the officer's hands." It was also agreed that a decree be rendered for the sale of the property, and the question of the priority of claim of the lessor for his rent due and to become due,

Case stated.

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BECKWITH vs BENT, DUVALL &c.

up to the day of sale, was submitted to the Chancellor. The Chancellor decreed that the mortgagees have priority over the landlord.

Beckwith has, by appeal, brought the case to this Court for revision. The question of law involved in this controversy, is to be determined by the construction to be given to the "act to amend the law of landlord and tenant," approved 9th March, 1843: (*Session Acts* 54.) Before the passage of this act a tenant could, during his term, sell or mortgage his goods and chattles, and the purchaser or mortgagee could hold them in defiance of any lien claimed by the landlord, as resulting to him, by law, from the relation of landlord and tenant, and the equitable interest of the mortgagor was not liable to be sold under a distress for rent: (2 *Dana*, 204; 3 *J. J. Marshall* 432; 4 *Dana*, 22.)

A tenant cannot after entering upon the premises, defeat the landlord of his rent by sale or mortgaging his property, but the lien of the landlord for one year's rent will be valid: (*Act of* 1843: *Ses. Acts* 54.)

The right of the tenant, thus to defeat his landlord, by mortgaging all his property to others, was regarded as an evil which ought to be remedied. The act of 1843, was, no doubt, intended to protect the landlord against the effect of such mortgages. It enacts "that hereafter the lessor and his representatives shall have a preference in the payment of the rent due to him from his lessee, or his representative, over any mortgage by the lessee, or his representative, *after entry on the premises leased;* and if there be not other property sufficient, the landlord shall have a right to distrain on any such mortgaged property, as if no mortgage thereof had been made: *Provided*, the preference herein given shall only extend to rent for one year next before the suing out of process, or the claims of preference." It is urged in argument, and such seems to have been the opinion of the Chancellor, that the rent secured to the landlord by this act, is only such as, at the date of the mortgage, was then actually due and owing by the tenant and legally demandable by the landlord. If that is a correct exposition of the act, we do not perceive that there was much, if any, necessity for its enactment. In the case supposed, the landlord without the aid of the act, could have had his distress warrant issu-

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ed immediately on the falling due of his rent, and thus have secured himself against any and all acts of the tenant and the creditors of the tenant, and if he failed to avail himself of this privilege, he could not complain of a loss, resulting from his negligence, or from the indulgence of supposed kindness to his tenant. We think such a construction is obviously contrary to the object of the Legislature in its enactment. Nor do we suppose, that the language used in the act, ought to be so understood. It expressly gives to the landlord a preference over any mortgage made *after* the tenant has *entered* on the *premises leased*. Surely it was not contemplated that the tenant, on the credit of his goods and chattels, then unencumbered by mortgages, or other liens, should obtain possession and occupancy of premises, and the day after entering upon them, provide for other creditors, to the exclusion of his landlord. We think the import of the words used, and the obvious meaning of the whole act, including the proviso, is, that for any rent not exceeding one year next before the suing out of process, or the claim of preference, the landlord has a lien superior to that of the mortgagee, whether the mortgage was made before or after the day when the rent was payable to, or legally demandable by, the landlord, that is, when the mortgage is made after the lessee enters on the premises leased.

The decree should have directed that the amount due to Beckwith, for rent and his costs, should be first paid out of the furniture sold, and then to apply the residue to the payment of the debts due to the mortgagees.

The decree of the Chancellor is therefore reversed, and the cause remanded with directions to render a decree not inconsistent with this opinion.

Duncan & Ripley for appellant; *J. W. Tyler* for appellees.

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CHANCERY. **Handy *vs* Commercial Bank of New Orleans.**

Case 32. ERROR TO THE LOUISVILLE CHANCERY COURT.

Mortgages. Foreign Corporations.

December 27 JUDGE GRAHAM delivered the opinion of the Court.

Case stated. ADDISON and Clendennin being indebted to the Commercial Bank of New Orleans, an incorporated institution in Louisiana, Clendennin, one of the firm, made his mortgage, dated 1st June, 1840, on a house and lot to secure the payment of the note of Addison & Clendennin for that sum, payable four months after the date of the mortgage, "and each and every renewal of the said note or debt for the whole, or in part, as may be agreed upon, by the parties hereto, (the mortgage,) or to said note, at the time when the said note, or renewal or renewals thereof, shall become due and payable, according to the tenor and effect of said note, or the renewal or renewals thereof." Clendennin afterwards mortgaged the same property to Handy, to secure him in large sums of money due to him from the same firm. The property being supposed to be insufficient to pay the demands of both creditors, Handy insists that the Bank has lost its lien, by the arrangements and conduct of the parties since the execution of the mortgage. The facts, as presented in the record, are, that when the note of $3338 58 became due, a new note, payable to Hall, the Cashier of the Bank, was executed for $2938 00, discounted by the Bank, and its proceeds applied to the first note, interest being paid in advance. When the last note fell due, another note to Hall, for $2500 00, dated 1st February, 1841, was discounted, and its proceeds applied to pay the note for $2938 00. When the note for $2500 00 fell due, another note was executed to Hall, the Cashier, for $2100 00, dated 1st June, 1841, and payable four months after date, was

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discounted by the Bank, and its proceeds applied to pay the note immediately preceding it. Other payments were from time to time made, so as to reduce the amount due from Addison & Clendennin to the Bank, to the sum for which the several notes mentioned were executed.

All these notes, except the first, were actually made and executed in Louisville, in this State, but were discounted by the Bank at New Orleans. It is argued by the plaintiff's counsel, that as the Bank is an institution not incorporated by the Legislature of this State; and as Hall acted as their agent in this State, each renewal of the notes was, in law, a new loan, and the transactions are contrary to the prohibitions of the act of 1812; that it was, in fact, a discounting of paper and lending of money, by that act prohibited. In support of this view, we are referred to the case of *Atterberry* vs *Knox & McKee*, (8 *Dana*, 282; *and* 4 *B. Monroe*, 90.) In that case the Bank of Maryland had an agent at Wheeling, in Virginia, "who received notes of said Bank, loaned and issued the same as money, on the usual banking terms, and was then and there doing a banking business." It was decided that a note executed to the Bank, in consideration of such loaning, was null and void, being in violation of a Virginia act, very similar in its provisions to the act of the Kentucky Legislature on the same subject. In this case, no notes of the Bank were issued or received, and no new loan was in fact made. It is true, the case of *Letcher* vs *Bank of Commonweath*, (3 *J. J. Marshall*, 195, *and* 1 *Dana*, 84,) decides, that when a Bank discounts a note for the purpose of renewing a former loan, in the usual way, each renewal is to be regarded as a new contract, and the new notes are equivalent to paying the existing debt, and again borrowing the money: (4 *J. J. Marshall*, 3.) In the cases referred to, the Bank had sued on the old notes, and the defendant, on the plea of payment, relied on the new notes as proof of the truth of his plea. In this case, however, the parties have, in their deed of mortgage, ex-

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O'BRYAN vs GOSLEE.

pressly provided for the renewal of notes, and have stipulated that the lien shall be continued for the payment of each renewal note. It is, therefore, unlike the cases referred to, and is like giving notes for the same consideration to the same person: (1 *Dana*, 85.)

A negotiable note was given to one payable at a bank in a sister State secured by mortgage as well as all notes given by way of renew — held that the mortgage was valid and not in violation of any statute of Kentucky.

We concur with the Court below, in the opinion that this transaction is not embraced by the act referred to, and that the new notes were but renewals of the old note, as agreed upon by the parties in the mortgage. But if the new notes, made in this State, were in violation of the law, then being null and void, they could not be relied upon as annulling the note secured by the mortgage, that note having been executed in Louisiana, and not in this State. That note can, therefore be, and should be upheld as a valid instrument in equity, subject, however, to be reduced by the payments subsequently made.

The decree of the Chancellor being in accordance with the views herein expressed, it is, therefore, affirmed.

Duncan & Ripley for plaintiff; *Fry* and *Page* for defendant.

CHANCERY.

Case 33.

O'Bryan *vs* Goslee.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Wills. Emancipation.

December 28.

JUDGE GRAHAM delivered the opinion of the Court.

WE concur with the Chancellor, not only in his exposition of the law of this case, but in his reasons and arguments. We therefore affirm the decree, and adopt as ours, the following opinion and decree of the Chancellor:

OPINION OF CHANCELLOR NICHOLAS.

THIS suit, for freedom, depends upon the proper construction of this clause, in a laconic will: "I give and bequeath to all my negroes their freedom, that my heirs or executors shall have no right nor title to them after

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they arrive at the ages hereafter mentioned, the males at twenty-eight years and the females at twenty-five years."

The complainant John was born of one of the females after the testator's death, and before she arrived at twenty-five years, and his right therefore depends on the question whether the will gave his mother immediate emancipation with a postponement of its enjoyment till she attained 25, or gave her only a prospective right of emancipation to take effect, provided, or only when, she attained that age.

"I give and bequeath to all my negroes their freedom, that my heirs or executors shall have no right or title to them after they arrive at the ages hereafter mentioned, the males at 28 years and the females at 25." Held that under this will, issue born before the arrival at age of 25 was free—that emancipation of the mother was immediate with the will of the owner to retain for service until 25 years old

My own opinion, apart from all authority, would be that the testator meant immediate emancipation, with a reservation to his heirs of merely the use of their services until they attained the prescribed ages. The result of the opposite construction, which would keep in slavery the issue born before the mother arrived at twenty-five, ought to be rejected, because it would go to defeat a very probable intention, to be gathered from the purport of the will. The testator evidently intended to dispose, by his will, of his whole estate; and as he has directly recognized and by general clauses disposed of the services of the negroes until they arrived at the prescribed ages, as being part of his estate, the presumption is, that if he had intended the issue, born before that time, should be slaves, and as such a part of his estate, he would have so said or made some specific disposition of them as such. The motive of the testator, in emancipating his slaves, was one of benevolence merely, towards the slaves themselves. Why that motive did not apply to and equally operate with him in favor of the after born, it is very difficult, if not impossible, to conjecture. If he intended, from mere motives of benevolence, that the mothers should be absolutely free at twenty-five, why should he have desired or intended that their children should be slaves for life, or why should he have contemplated a distinction between their children, dooming to perpetual slavery those who were born before the mothers attained twenty-five, and emancipating those who were born thereafter? In the absence of any assignable motive for

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O'Bryan vs Goslee.

such merely capricious discrimination, we cannot properly impute to the testator such intention. The opposite intention, one which would be produced by an equal feeling of benevolence towards the children as towards the mothers, and would prevent any arbitrary distinction among the children themselves, is what should rather be inferred from every rational principle and is what would unhesitatingly occur to every rational mind not affected with the niceties of judicial disquisition. Such being the probable intention, is there any thing in the language used of that technical character which will force us to a different interpretation of the devise? I think not. After a careful comparison of the language used, with that of the deed and devises commented on in the various cases to which I have been referred by defendant's counsel, I find none of these conflicting directly with what I deem the rational construction of this devise, but several of the cases are strongly in its confirmation. In *Fanny* vs *Bryant*, (4 *J. J. Marshall*,) the language of the deed was, "I emancipate Julia and her increase after 1st January, 1816." The question was whether the increase before that day, as well as the children born thereafter, were emancipated. The Court say he never could have intended that the mothers should be free and their children slaves—that such intention would be incompatible with his benevolent motives.

In *Charles* vs *French*, (6 *J. J. Marshall*, 332,) the language of the deed was, "I now immediately liberate Susannah, to go free at the expiration of eight years from this date." Charles was a son of Susannah, born before the expiration of the eight years, and the Court decided that the deed emancipated him; that the grantor intended to renounce, at once, all title to the negroes as slaves. That he emancipated them *then*, but postponed the enjoyment of perfect liberty for eight years; that in the meantime they were servants, but not slaves; that they remained in servitude but not in slavery; and that this temporary servitude was intended for the benefit of the negroes and not of the grantor.

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In *Hudgens* vs *Spencer*, (4 *Dana*, 589,) the language of the deed reads: "I do hereby emancipate the following men, women and children: Judy to go out September, 1806," &c. &c. "I do relinquish all right to said people after they, severally, arrive at the dates above mentioned, and *not before*." This language, it was decided, did emancipate Judy at the date of the deed; that she did not remain a slave until September, 1806, when she was to go out, consequently her son Spencer, born before then, was free. This too, though the Court concedes that the literal import of the deed, without regard to the subject matter and intention, would have required a different decision. But they say, intention, must overrule mere verbal and grammatical considerations; that, without the after clause, such would be ever the proper grammatical construction, as was decided in *Fanny* vs *Bryant*, and in *Charles* vs *French*. That in postponing the time of actual liberation, the grantor did not mean to put off their enjoyment of personal rights, but only to reserve to himself temporary service. It appears to me to be vastly more difficult to give the effect of immediate emancipation to the language of this deed, than to the devise, in this case, which is, "I give to all my negroes their freedom, that my heirs, &c., shall have no right to them after they arrive at the age of 25," &c. There you do not have to resort even to intendment in aid of a literal construction, but have rather to use it for the purpose of preventing the first member of the sentence from carrying immediate emancipation for every purpose. To save the rights of the heirs to their services before attaining the prescribed ages, we have to resort to intention to show that some power was reserved to them for that purpose, or the after clause of the sentence would be nugatory. But whilst so using the intent for the purpose of making the whole sentence harmonize, we can carry it no farther than what is necessary for that object. This is fully accomplished by saying, as the Court of Appeals did in the cases cited, that the testator meant to manumit his slaves immediately, but to postpone the perfect en-

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JARVIS & TRABUE vs QUIGLEY &c.

joyment of freedom, and in the meantime they were to be servants and not slaves. According to the course of decision in this State, complainant is not entitled to a decree for hire before the institution of the suit, as it does not appear that defendant was a *mala fide* holder.

Field for appellant; *Guthrie & Tyler* and *J. Harrison* for appellee.

CHANCERY.

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Case 34.

Jarvis & Trabue *vs* Quigley, &c.

APPEAL FROM THE SIMPSON CIRCUIT.

Trusts. Limitation of estates. Purchase.

December 29. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

JARVIS & Trabue being creditors of Joseph Quigley, by judgment with an execution thereon returned "no property," filed this bill to subject to the satisfaction of their debt certain slaves, as being the property of said Joseph on the death of his wife, under and by virtue of a deed of trust from Thomas Quigley to J. M. Burton, the true construction and operation of which present the only questions to be considered by this Court.

The deed, professing to be between Thomas Quigley and James M. Burton, "witnesseth, that the party of the first part, for and in consideration of the sum of one dollar, to him in hand paid by the aforesaid James M. Burton, trustee in trust, for the use and benefit of Eleanor M. Quigley, wife of Joseph Quigley, and the heirs of her body begotten by the aforesaid Joseph Quigley, the receipt of which is hereby acknowledged, as well as in consideration of the interest and well being the grantor herein feels in the future comfort of the aforesaid Eleanor and her aforesaid children, in being and expectancy, hath this day given, granted, &c., to the aforesaid J M. B., trustee in trust as aforesaid, the following slaves, to-wit: (naming them,) together with the future increase of the aforesaid slaves, and each of them. To have and to hold the aforesaid slaves, &c., to the only use &c. of the aforesaid J. M-

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B., trustee in trust as aforesaid, and his successor as trustee forever." The deed then recites, that the slaves had been purchased by the grantor, under a decree in his favor against said Joseph Quigley; then follows a covenant of warranty, which is succeeded by the following clause, viz: "It being the distinct understanding of the parties hereto, that the aforesaid slaves and each of them are, in no event, to become liable to or for the debts of the aforesaid Joseph Quigley; but said slaves and each of them, and their increase, are to be held, kept and used by the aforesaid trustee, for the sole and exclusive use and benefit of the aforesaid Eleanor, and the heirs of her body, by the aforesaid Joseph Quigley." And in case of the death, resignation, removal or refusal of the said trustee, a power is given to the said Eleanor to appoint another.

It is contended, that by force of the words "heirs of her body," this deed creates an estate tail in Eleanor Quigley, which vested in her husband, subject during her life to the sole and separate use secured to her, and which, at her death, became absolute in the husband. But it is manifest that this construction defeats the benefit intended for the children, and violates the obvious purpose and object of the deed, which, as appears clearly upon its face, was intended to secure the use, not only to the wife, but also to the children, of the marriage. And the only question is, whether there is enough in the deed to effectuate that intention clearly manifested, or whether, by force of the technical expression "heirs of her body," the manifest intent and object of the deed is to be sacrificed. If there were nothing in the deed to show that the expressions referred to were not used in their technical sense as embracing the whole line of issue, the consequence contended for would certainly follow. But it is made clear, beyond dispute, by the words of the deed itself, that the expression "heirs of the body" is not used in this technical sense, but as meaning her children. This is manifest, first from the fact that in trust for the comfort, &c. of the children, as well as of the mother, is set

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JARVIS & TRABUE vs QUIGLEY, &c.

forth as one of the considerations and as the only consideration, except the nominal one of one dollar, moving the grantor to the execution of the deed, and again, and with unquestionable certainty, by the words, "her aforesaid children, in being and expectancy," used in reference to the words "heirs of her body," previously used in the same clause, and which show conclusively that "heirs of her body," as used in the deed, did not embrace the whole line of her issue by her then husband, but their children only.

The term 'heirs of the body' in wills is very generally understood and taken as words of purchase and to convey an independent interest to children, and not as words of limitation. The same words are so taken when the intention clearly appears to be to give a present interest to the children: such was the construction given to the words by the English Courts, especially when used as applicable to a chattel.

This intended sense of the technical expression, being placed beyond question by the following words, there is no doubt that if this were a will instead of a deed, the words "heirs of her body," would be regarded as words of purchase, giving an independent interest to the children, and not as words of limitation, annexed to, and describing the estate of the mother, as was decided, at the present term, in the case of *Prescott* vs *Prescott's heirs*, (page 56.) And although the same benignity of construction is not always extended to deeds as to wills, yet as this deed was obviously founded upon motives of benevolence and affection alone, and is in the nature of a marriage settlement, intended expressly to provide, not only for the wife, but also for the children; and as it is most inartificially drawn, we think there is sufficient ground in the general principles of construction, and in the principles which prevail in the construction of marriage settlements and covenants to stand seized, for giving to the words referred to, that operation and effect which properly belongs to the sense in which they were used, as certainly indicated by other parts of the deed. It would be strange, indeed, if when the sense in which a particular phrase is used in such an instrument, is clearly explained, and the deed can operate according to that sense, without violating any principle of law, Courts were obliged to put a different sense upon them, though it should defeat the manifest object of the parties. The contrary principle is, as we believe, generally conceded. There are many cases in marriage

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settlements and covenants to stand seized, in which the Courts of England have construed "heirs of the body," and especially with reference to chattels, to be words of purchase, when it was clear, from other expressions or circumstances in the instrument, that the phrase was used in a restricted, and not in a technical sense: (2 *Vesey, sen.* 660; 3 *Atk.* 642, *&c.*) And the cases in which a similar decision has been made upon wills are numerous and familiar. The question, in all such cases, is whether the restricted sense of the words is indicated with sufficient certainty, as we have seen that it is in the present case.

The intent of the grantor is to have its weight in the construction of deeds.

We therefore construe "heirs of the body," in this deed, as meaning children in being and expectancy. And although the conveyance to the sole use of the wife and her children in being and in expectancy, might be understood, as giving to the wife an interest in common with her children, and which might go to her husband on her death, yet, as this is not the necessary construction of such a conveyance, and as it is repelled by the provision that in no event shall the slaves or any of them become liable to the debts of the husband, but that they, and each of them and their increase, shall be held for the sole use of the wife and the heirs of her body, that is, her children in being and expectancy, we are of opinion that it will best comport with these provisions and with the obvious intent of the grant, to construe it as giving to the wife no interest beyond her own life, and vesting in the children, at her death, whatever interest she had. In this view, it is unnecessary to determine whether she had a life estate in the whole, with remainder to her children, or whether she had a life estate in an aliquot part only with remainder to them. In either case, the husband would not take her interest on her death, and as none of the children are shown to have died after the date of the deed, there is no pretence that he has any interest derived from them, and therefore no ground for any question as to what would become of the interest of a deceased child.

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SPEED, &c. vs BROWN, &c.

Under this construction of the deed, the husband had no interest in the slaves to be subjected to his debts, and therefore the decree dismissing the bill is affirmed.

J. & W. L. Harlan for appellants; *Grider* for appellees.

CHANCERY.

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Case 35.

Speed, &c. *vs* Brown, &c.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Equitable interests and choses in action. Town and City officers.

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December 29. JUDGE GRAHAM delivered the opinion of the Court.

Case stated. BROWN, Curtis and Vance, judgment creditors of Speed, being unable to collect their debt by execution, on the 26th July, 1848, exhibited this suit in chancery, to enjoin the City of Louisville from paying to Speed so much of his salary, as City Marshal, due and payable 31st July, 1848, as would pay their demand. Speed's salary is $750 per annum, payable monthly; that is, $62 50 at the close of each month. Speed, in his answer, states that in the month when the bill was filed he had in his hands monies of the city, received in discharge of the duties of his office, more than enough to pay his monthly salary, and the city, in fact, owed him nothing when the bill was filed, nor at the end of that month. It appears, from the answer of the city by the Mayor, and from the proof in the cause, that no payment is made to any of the officers of the corporation, except by order of the Mayor and Council, and it frequently occurs that the meetings of the Council take place a few days before the salaries are due, and then payment is made in advance; that whenever the Marshal has money in his hands belonging to the city he receives scrip for his salary and pays the scrip, thus received, into the treasury, and retains the money due him. In this case, the Clerk who discharges that duty did, on the 24th July, two days before the commence-

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ment of this suit, issue his order on the Treasurer for $62 50, being for one month's salary of Speed as Marshal. The certificate was ready for Speed, but it seems he did not call for it. The salary was not due till the 31st of the month. The Chancellor decreed that the city pay the complainants said sum of $62 50, and from that decree Speed has appealed to this Court. We regret that we have been able to find but few adjudged cases bearing even remotely on the main question involved in this suit. The case of *Divine* vs *Harvie*, (7 *Monroe*, 439,) which is much relied on by Speed's counsel, is not strictly analogous to the one now before us. An appropriation of money had been made to Divine by the Legislature of this State, for services rendered, fuel, &c., furnished to the Legislature. Harvie, a creditor of Divine, sought, by his bill, to reach the fund through the Auditor and Treasurer, who were made parties to his suit. The Court, for several reasons, were of opinion he could not maintain his suit. The money belonged to the Commonwealth until it was received by Divine, and the Legislature had not thought proper to provide any mode by which the Commonwealth could be sued. Nor could the funds of the Commonwealth be reached by a suit against her officers; that the Auditor and Treasurer were not proper parties to the suit, and could not be used as a substitute for the State. The Court then assigns some general and strong reasons, of public policy and public convenience, why it would be improper to permit governmental operations to be clogged, or its business interrupted, by crippling the means of her agents and officers, and thus preventing them from the proper discharge of their duties. We refer to the opinion for the views of the majority of the Court, then so well expressed. The same reasons, that officers of a State should not, to satisfy their creditors, be deprived of their salaries, the means of sustenance for themselves and families, are applicable, to some extent at least, to the officers of a town or city. But if the existing laws do not afford the same protection to the city officer which is given to the State

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SPEED, &c. vs BROWN, &c.

officer, it is a question with the law making, and not the judicial department to determine whether it is expedient that their salaries should not be withholden from them. In the case of *Kennedy* vs *Aldridge*, (5 *B. Monroe*, 141,) it was determined, that when a public officer has received, from the treasury, through an agent, monies to which he was entitled for public services, it is no longer to be regarded as a debt from the State, but becomes a debt from an individual, not distinguishable from other individual debts or demands; and is a chose in action liable to be subjected to the debt of the person entitled to it.

The statute under which this proceeding was instituted, subjects to the satisfaction of a judgment any choses in action belonging to the debtor. When the debtor has, by the sale of property, or by services rendered, acquired a right to demand pay from another, he has a chose in action, within the meaning of the statute. Hence, in *Teeter* vs *Williams*, (3 *B. Monroe*, 562,) this Court said, "the creditor may, by the aid of the Chancellor, attach whatever may be due to his debtor, for labor already performed, and he may attach whatever may become due upon his contract for his future labor; but neither the creditor nor the Chancellor can compel the debtor to work out his part of such a contract, so as to earn the promised reward for the exclusive use of the creditor. If the Chancellor could exercise such power of compulsion, he would not fail to allow to the debtor, out of the proceeds of his labor, so much as was necessary for the support of himself and family." The statute which authorizes Justices of the Peace to subject choses in action to the payment, of judgments under five pounds, expressly provides, that the act shall not extend to authorize the attachment of money or property, on account of labor or personal services *not fully rendered:* (3 *Stat. Law*, 376.) Such being the law, or rule in equity, as to contracts, where individuals are the sole parties to a contract, it becomes an interesting inquiry, whether a contract made by a city with an officer for the performance of personal ser-

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vices, such as discharging the duties of Marshal, come within the spirit of the acts referred to. We have already said that, as the city may be sued, at law or in equity, this case is in that particular, unlike that of *Divine* vs *Harvie*, (7 *Monroe* 439.) But a city and its inhabitants have a kindred interest with that of a State and its citizens, in the faithful performance of public services by public officers. If, by attaching the salary of a State officer, the public service might be injured, or the State, thereby, deprived of the services of citizens eminently qualified to discharge the duties of the offices entrusted to them, so may the town or city be injured in the same way.

Though a creditor may not have a decree against the State for money due an insolvent debtor who is an officer of the State (*Divine* vs *Harvie* 7 *Mon.* 439) yet such decree may be rendered against a town or city corporation, which may be sued for money actually due to a town or city officer for services at the filing of this bill.

The considerations suggested, have brought us to the conclusion that the rule to be adopted, in its application to this and kindred cases, ought, in some respects, to differ from that in *Divine* vs *Harvie*, and that in *Teeter* vs *Williams*. It seems to us, that as the city is a corporation which may be sued, a creditor unable, by execution at law, to coerce his debt, may subject to that debt the money actually due and owing from the city to the officer, for services, at the time of the commencement of the suit fully rendered, or where the money has been set apart for his use, and subject immediately to his demand. To extend the rule further, and permit the creditor to file his bill in anticipation of future salary to become due for services to be rendered in future, would be detrimental to the public weal, oppressive to the debtor, and would result in expelling the debtor from the public service, to seek, in some other employment, or other more favored position, the means necessary to the comfortable maintenance of himself and his family. For, if the suit may be instituted five days before the salary is due, the same principle would authorize its commencement at any time, even the day after the duties of the office are, by appointment, devolved on the officer.

As this suit was commenced on the 26th July, when the salary attached was not actually due until the 31st of that month, the rule here laid down would lead to a

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dismissal of the complainant's bill, but for the fact, that in accordance with the practice of the city council, the pay of the officer for the entire month had been actually set apart, and ordered to be paid to him on the 24th. Speed could have received his pay two days before the suit commenced. In fact, the Mayor, whose deposition was taken in the cause, seems to have considered the money as actually paid to Speed. From the deposition of the Clerk, it appears the mayor was mistaken. It was not paid, but the certificate or order for payment was made out, ready for delivery to the officer. The facts of the case, therefore, justified the decree of the Chancellor. The decree is affirmed.

Pirtle & Speed for appellants; *Guthrie & Tyler* and *Craig* for appellees.

CHANCERY.

Smith *vs* Dawson.

Case 36.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Limitation. Partnership.

1850, *January* 1. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THE account of the steamer Nautilus against Richard P. Smith, set up in the bill of Dawson, and of which he claims one-fourth, seems to have been commenced while said Smith and Dawson were joint owners, the latter owning one-fourth of the boat. It appears, however, to have been continued, as an account current or open account, after R. P. Smith sold his interest of three-fourths to Wm. H. Smith on the 29th of March, 1842. And on the 14th May, 1843, which was nearly one month after the last charge, and nearly two months after the last credit, a balance seems to have been struck and the account signed by the Clerk of the boat. The account, as presented in the exhibit filed, seems afterwards to have been continued by stating, first, the former balance of the 14th of May, brought from the ledger, at $718 28; and then follow two charges, under

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date of November 1843, amounting to $55, and on the other side are two credits, apparently of the same date, amounting to $92 92, by which the balance is reduced to $683 36, one-fourth of which is claimed by the complainant, who comes into chancery on the ground either that a great part of the account accrued while the defendant was joint owner of the boat, or that Wm. H. Smith being dead, the defendant is his administrator.

The bill was filed on the 14th of June, 1848, and the defendant, besides denying that he owes any thing, relies upon the statute of limitations to bar the claim. The plea, however, seems to have been disregarded, and one-fourth of the final balance to have been decreed to the complainant. The only question presented, for the decision of this Court, is as to the application and effect of the statute of limitations.

Accounts not between merchant & merchant, nor relating to the trade of merchandise, are not within the exceptions in the statute of limitations. The Courts of Kentucky will apply the limitation in cases of suits on accounts to all the items sold more than five years before suit.

This account, not being between merchants, nor relating to the trade of merchandise, is clearly not within the exception in favor of such accounts as made in the statute. And if the owners of the Nautilus were to be regarded as partners in reference to this claim, still, as the joint ownership between the complainant and defendant was absolutely terminated more than five or even six years before the suit was commenced, the effect of the statute could not, on that ground, be avoided, though there might have been no remedy but in equity. This was decided in *Lansdale* vs *Brashear*, (3 *Monroe*, 331–2,) and in *Taylor's administrator* vs *Morrison's executor, &c.*, (7 *Dana*, 242.) Then the only ground of repelling the application of the statute, in this case, is the fact that a few small items of the account appear to have been entered within five years. Waiving the consideration that these items having been entered after a balance struck in the original account, and after a change in the ownership of the boat, ought to be regarded as forming a new account, and may have been, in part, so entered on the books, and assuming that the whole account constitutes, properly, but one open account, there seems to be no doubt that, according to the decisions of

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the English Courts upon their statute of limitations, the fact that one or more items are within the time of the limitation, would save the whole claim from the effect of the bar. But although our statute is substantially the same, this Court has uniformly repelled that construction by which the British Courts have made exceptions to the statute beyond either its letter or any fair interpretation of it; as in *Bell* vs *Rowland*, (*Hardin*, 301;) *Head's executor* vs *Manner's administrator*, (7 *J. J. Mar.*, 261–2;) *Fisher's administrator* vs *Hess*, (9 *B. Monroe*, 617–18;) *Lansdale* vs *Brashear*, above cited, and in many other cases. And in *Lansdale* vs *Brashear*, the Court says in reference to the doctrine "that if there be a few, or the last item of the account within the six years of their (the English) statute, the whole account is excepted from the statute, and cannot be barred;" that "this forms a new exception to the statute not contained in its letter and wholly incompatible with former decisions of this Court."

In conformity with the opinion thus expressed, and with the general current of decisions by this Court upon the statutes, we are decidedly of opinion that no part of this, or any other similar account, can be exempted from the operation of the statute, except such part as actually accrued within five years before the commencement of the suit, unless some fact be shown besides the mere date of the last item tending to prove a recognition of the prior account, or claim, within five years. And, as in this case, the items which are within the five years, show an excess of credits above the debits, there can be no recovery to any extent, unless the fact that the defendant, who is charged to be the debtor, is also the administrator of Wm. H. Smith, who was the joint creditor with the complainant, should render it proper to add six months to the time allowed in other cases. But the demand not being against the deceased party, nor against the defendant, as his administrator, there seems to be no ground for applying to this case the rule which allows six months to be added to the usual period of limitation, and especially as the defendant could

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not rely upon any privilege, belonging to his character of administrator, in bar of his claim. We may add that the credits in the account, after the defendant sold out his interest in the boat exceeded the debits charged after the same time.

Wherefore the decree is reversed, and the cause remanded with directions to dismiss the bill.

Pirtle & Speed for plaintiff; *Field* for defendant.

Davidson *vs* Davidson.

PET. & SUM.

Case 37.

ERROR TO THE ANDERSON CIRCUIT.

Evidence. Award. Copies.

January 1.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

THIS was a suit by petition and summons on a promissory note brought in the Anderson Circuit Court. The defendant filed a plea of payment, with leave to give in evidence any matters of defence, which could have been specially pleaded. Upon the trial, he offered, in evidence, a copy of an agreement of the parties, to submit certain matters of dispute between them to arbitration, and to perform the award, and a copy of the award made in pursuance of the submission, and proved that they were true copies of genuine originals, and that the originals were filed in the Franklin Circuit Court, in a suit there pending between the same parties. These copies were objected to by the plaintiff, but the objection was overruled, and the defendant was permitted to read them as evidence to the jury.

A verdict having been found for the defendant, the Court rendered a judgment thereon in his favor, and overruled the plaintiff's motion for a new trial. To reverse that judgment, the plaintiff has prosecuted this writ of error.

The testimony shows clearly that the debt sued for in this case, was not taken into consideration by the arbitrators, or embraced in the award. The submission

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did not include all matters of controversy between the parties, and consequently the award does not preclude a recovery on this demand, which was not passed upon by the arbitrators. If there were any evidence in relation to the payment of the debt, it was of a very doubtful and unsatisfactory character, and it is very questionable whether it ought to be regarded as sufficient to sustain the verdict of the jury. But we shall not decide this point, as the judgment will have to be reversed upon another ground.

Copies of written agreements of a private nature, not required to be recorded, are only secondary evidence and inadmissible, unless the original are lost or destroyed, in the possession of the opposite party or beyond the jurisdiction of the Court. The fact that they are filed in a cause in the Circuit Court of the State, does not authorize the reading of copies.

The general rule is, that the best testimony within the power of the party must be produced. Copies of written agreements of a private nature, not required by law to be recorded, being only secondary evidence, are inadmissible, unless the originals are lost or destroyed, or in the possession of the opposite party, or beyond the jurisdiction of the Court, and the control of the party desiring to use them. In this case the originals could have been obtained by the appropriate process, directed to the Clerk of the Franklin Circuit Court. The mere fact that private writings have been filed in one Circuit Court in this State, does not authorize copies to be used as evidence in a suit pending in another Court. To admit copies, as evidence, in such a case, would be extending the principle, in relation to secondary evidence, further than it yet has been, or the reason of the rule would authorize it to be carried. Indeed, in the majority of cases, such a doctrine would impose upon the party not requiring the use of the writings, the necessity of having the originals produced, especially where their execution was contested, so that the result would be, that although copies might be relied upon by one party, the originals would be brought forward by the other.

The statute of Kentucky of 1795, authorizing copies of bonds or other writings in which two or more may be bound and

The statute of 1795, (1 *Stat. Law*, 316,) which authorizes a copy of a bond or other writing, in which two or more persons are jointly bound, and which shall be filed in the Court in one district and suit brought upon it in another, to be filed by the plaintiff, and admitted as evidence upon the trial, provided it be

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attested by the Clerk of the Court where it was filed, does not sanction the use of the copies offered as evidence in this case. The statute applies alone to the single case specified. In that case, the writing being the foundation of the action, the defendant has knowledge of the intention of the plaintiff to rely upon it, and virtually admits its execution, unless he denies it by an appropriate plea, in which event the statute provides for the production of the original. But when a writing is introduced merely as testimony, the opposite party might not be apprized of its intended use, and if a copy were admissible, an advantage might be obtained by his adversary in consequence of the absence of the original. It seems to us, therefore, that the Court erred in permitting the copies of the agreement of submission and award to be used as evidence upon the trial.

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which may be filed in the Court in one district, and suit brought upon it in another, to be filed by the plaintiff, and admitted as evidence on the trial provided it be attested by the Clerk where it is filed, does not apply to the facts of this case where the original, the copy of which is offered, is not the foundation of this action.

Wherefore the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

Lindsey for plaintiff; *Herndon* for defendant.

Lee &c. *vs* Fellowes & Co.

COVENANT.

ERROR TO THE BULLITT CIRCUIT.

Case 38.

Fraudulent Mortgages. Usury. Sales in gross.

JUDGE GRAHAM delivered the opinion of the Court.

January 1.

W. & C. Fellowes, Whitlock & Kaye, Longstreth & Bouldin, and Summers & Simmons, judgment creditors of Crist & Simmons, being unable to coerce their several demands by execution, each exhibited a bill in chancery to set aside, as fraudulent, a mortgage made by Jonathan Simmons, one of the firm of Crist & Simmons, to Lee, on land and negroes, and a mortgage to John S. Simmons on three slaves. If the transactions are not decreed to be fraudulent, they then seek to reduce the amount secured, by cleansing the transactions of usury. In the progress of the cause, various amended bills and answers were filed by the respective parties,

The case stated.

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The several suits were consolidated. Lee and Simmons insist that each mortgage was in good faith, and free from usury. There is no evidence that any usury is included in the note to John S. Simmons, but as to Lee, the evidence sustains the report of the Master Commissioner appointed to investigate that matter. Executions having issued against the estate of Crist & Simmons, were levied on the mortgaged estate, which was sold, subject to the mortgage. At the Sheriffs sale, Lee became the purchaser of all the property mortgaged to him, at the bid of five dollars, and for a like sum, John S. Simmons purchased the three negroes mortgaged to him. Each purchaser having taken possession of the property so mortgaged to, and purchased by him, the Court directed its Commissioner to ascertain the value of the rents and hires with which each mortgagee was justly chargable, and to report the sum due to each, after cleansing the transactions of usury, and deducting rents and hires. The Commissioner, after taking proof, made his report. Some complaint is made of his estimate, but the proof abundantly sustains its correctness. But it is urged that as Crist & Simmons refuse to plead the usury, and ask no relief on account of it, and refuse to their creditors the privilege of the benefit of the usury, the creditors could not maintain their bill therefor, and the Chancellor erred in reducing the mortgagees' demands on account of the usury included in the notes.

Where a borrower has paid usury, his creditors cannot sue for and reclaim it, but creditors may purge all usury from unpaid debts where the funds of a debtor are insufficient to pay his debts, though secured by mortgages.

Where the borrower has paid usurious interest, his creditor cannot, without his consent, sue for and recover of the usurer the amount of the usury so paid. But where the usury has not been paid, and where the matter in contest between creditors is, what sum each may lawfully and equitably assert against the debtor, whose means are insufficient to pay all his debts, we apprehend that the rule is, and ought to be different. The sum legally due to a creditor, is all that, in good conscience, he ought to be permitted to assert, to the prejudice of the claims of other *bona fide* creditors. It does not at all affect the usurer's demand against his debtor, as

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between themselves. If the latter does not choose to rely on the usury, or if he desires to pay it, be it so. No one can control his wishes on that subject. But as the taking of usury is expressly discountenanced by law, we only say, that the usurer and his debtor shall not be permitted to increase the demands of the one against the other, by the addition of illegal interest, to the prejudice of other creditors.

The next subject of inquiry is, the purchase, by Lee & Simmons, at the execution sale, of the mortgaged property. Simmons does not controvert the charge that the sale to him was in gross. Lee, in his first answer on that subject, admits it; in his second, he does not remember; and in his third, says the land and slaves were each sold separately. The Sheriff's return was that of a sale in gross. He subsequently amended it, and made it a sale in parcels, and has given in his deposition to sustain his amended return; but the evidence is very clear, not only by witnesses on the ground at the time of the sale, but by the statements of the Sheriff and Lee, that the sale was in gross; that is, that the land and negroes were all set up at once, and one bid was made for the whole.

Mortgaged property sold under execution, subject to the mortgage, should be made as other sales of like property. So if sold irrespective of the mortgage. A sale of land and slaves, in gross, therefore, where the mortgagee so purchased, the sale should be treated as a nullity.

The statute which subjects mortgaged property to sale under execution, expressly enacts, that it shall be sold "in the same manner as such property might have been sold if no such incumbrance (as the mortgage) had existed:" (1 *Stat. Law*, 653.) If sold absolutely, and not subject to the mortgage, it would not be controverted, that the land, and each slave, should have been separately sold, and a sale in gross, in each case, would be set aside. The sale subject to the mortgage is, by the above cited statute, required to be made in the same manner. A sale in gross would be often detrimental to the best interests of debtor and creditor, and ought not to be countenanced, independently of the statute. There was no error in the decree disregarding the sales and purchase, and subjecting the property to a re-sale. We do not perceive any error in the details of the de-

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HILL
vs
HARRIS.

cree, and as it is in accordance with the principles sanctioned by this opinion, it is, therefore affirmed.

Hite, J. & W. L. Harlan, Guthrie and *B. Hardin* for plaintiffs; *Riley, Thompson* and *Grigsby* for defendants.

TRESPASS. QUARE CLAUSUM FREGIT.

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Case 39.

Hill *vs* Harris.

ERROR TO THE JOHNSON CIRCUIT.

Execution sale.

January 1. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS was an action of trespass, *quare clausum fregit*, by Harris against Hill, for entering the plaintiff's close with wagons, &c., and taking away a large number of bricks of the plaintiff. The defendant claimed as purchaser, under an execution against Harris in the hands of a Constable. And the only question presented is, whether a levy upon three thousand bricks, in a kiln containing a much larger number, without either separating the bricks levied on, or otherwise designating them, than as three thousand bricks on the lot of the defendant, is sufficient to authorize a sale, and whether a sale made in the same general terms is sufficient to authorize a subsequent selection and delivery of bricks by the officer to the purchaser.

It is not necessary for an officer in making a levy upon bricks in a kiln, to separate the bricks levied on from the remainder in the kiln, but may, at his peril, leave them in the kiln—nor to touch the brick—nor to minutely describe them.

It certainly was not necessary that the officer should have taken from the kiln the designated number of bricks, at the time of the levy. It was more convenient and better for all parties, that they should remain in the kiln, where they were reasonably safe from injury, than that they should either have been placed near it in one or more piles, or should have been removed from the lot. In the former case, they might have been liable to depredation, and might have been injured in the act of removal. In the latter case, besides being subject to injury in being removed, it might become necessary, after the sale, to return a part of them to the place from which they were taken. It does not appear

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what particular acts were done by the officer in making the levy. He returns that he levied on the bricks, and it is to be presumed that he did what was necessary for that purpose, unless the contrary appears. He was not bound to take the bricks away, but had a right, at his peril, to leave them in possession of the defendant, or in the place where he found them. It was not necessary actually to seize or to touch every individual brick. To have taken or touched one in the name of all would have been, in the technical sense, a formal levy. And we suppose that the actual touching of even one, at the time of the levy, was not necessary, so far at least as the defendant was concerned, to authorize the sale of the same bricks found at the same place on the day appointed for the sale. It was sufficient that, at the time of the levy, they were in his power, and might, if necessary, have been touched or taken away, and that he indicated the levy by word or deed, or by entering it on the execution.

Then the real question in this case is, not as to the manner of making the levy, but as to the manner of describing the thing or things levied on. And this, we think, depends upon the construction to be given to the terms used in describing the levy. The same reasons which dispense with the actual seizure of each individual brick intended to be sold, dispense also with a particular or separate description of each in making or stating the levy. The comparative insignificance of the individuals, separately considered, and their general similarity, authorize the use of general words in discribing them. If a part only of a mass of bricks is to be designated, the part might be designated as one half or as as one fourth or as a certain number, or as a certain number on a particular side or in a particular part of the mass, or as a certain number of hard or of soft, or of good or of bad bricks. The owner might undoubtedly sell a portion of the mass by either of these modes of description, and even if the purchaser should become thereby only a tenant in common, he could not be sued in trespass for taking his portion according to the des-

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HILL vs HARRIS.

cription. What then would be understood by a sale of a certain number of bricks in the mass, without reference either to position or quality? We think it would be understood as a sale of so many bricks, to be taken from the mass in the usual way, and as they come. If they be in a kiln which is unbroken, it is implied that upon opening the kiln in the usual way until that part is reached which presents bricks fit for use, the bricks then presented, are to be taken indiscriminately in the usual manner of taking bricks from the kiln. If the kiln has been opened before the sale, and the best bricks are in view, the sale of a certain number, without other designation, would be understood as referring to those which were nearest at hand, and it is presumed that the price would be proportioned to their quality.

The sale of a certain number of bricks in a kiln implies the right of the purchase upon opening the kiln to take the requisite number of brick fit for use, indiscriminately in the usual way of taking bricks from a kiln, and the sale is valid.

As an officer, intending to levy upon three thousand bricks in a kiln of eighty thousand, (as in this instance,) could not properly remove all of the inferior bricks and take those of the best quality, wherever they might be found, but could only take the number in the usual manner, therefore, his return, that he had levied on the three thousand bricks, without further designation, should be understood as designating three thousand to be taken indiscriminately from that part of the kiln which is open, or if it be not already opened, to be taken indiscriminately after opening it in the usual manner. So understood, we think that the levy was sufficiently certain to authorize the sale, and that the sale in the same manner authorized the officer to deliver, and the purchaser to receive and carry away, the designated number of bricks taken in the mode above referred to. And this mode having, as appears, been substantially pursued in the present case, we are of opinion that the defence was made out, and that the Court to which the law and facts were submitted decided erroneously in rendering judgment for the plaintiff.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Barnes for plaintiff; *Apperson* for defendant.

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Tyler *vs* Webb.

DEBT.

APPEAL FROM THE SHELBY CIRCUIT.

Case 40.

Arbitrations. Awards.

JUDGE SIMPSON delivered the opinion of the Court. *January* 8.

THE parties having made a submission to Turner Satterwhite, R. I. Baker, and Thomas Parker their umpire in case of a disagreement, and an award having been made by all three of them jointly, an action of debt was brought upon it; and a demurrer having been filed to the declaration, it was overruled by the Court, and a judgment rendered for the plaintiff, from which the defendant has appealed. Case stated.

The objection made to the declaration is, that it does not contain an averment that the arbitrators had disagreed; and as by the terms of the submission, the umpire derived his authority to act from their disagreement, and could only, in that event, make an umpirage; that the validity of the joint award depends upon that contingency, and as the declaration does not allege that it had occurred, it is fatally defective.

It has been adjudged, that if the submission be to two and their umpire, an award made by three, jointly, will be good: (3 *Burr:* 1474.) It has also been decided, that the joining of the arbitrators with the umpire, is but surplusage, and does not vitiate the instrument purporting to be his umpirage: (1 *Black. Rep.* 463.)

Upon a submission to two and their umpire an award made by the three jointly is valid (3 *Burr.* 1474: 1 *Black. Rep.* 463.)

It is contended, however, that there is a distinction between a submission to the award of two and their umpire, nothing more being expressed, and a submission to the award of two, and their umpire in case of disagreement. That, in the latter case, the authority to the umpire to act, is limited by the terms of the submission, and in the former it is not.

There is no well founded distinction between a submission *to two and their umpire*, and a submission *to two and their umpire in case of disagreement.* (1 *Bac.* 211 *let. D.*) (*Hunter* vs *Bennison, Hard.* 43.)

There is, however, no substantial distinction between the cases. The word *umpire*, in its common significa-

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tion, denotes one who is to decide the controversy in case the others cannot agree: (1 *Bac.* 211, *letter D, title Arbitriment and Award.*) A submission, therefore, to two arbitrators and their umpire, or to two and their umpire, in case of disagreement, means precisely the same thing. If a joint award by all three, is valid under one submission, it must be under the other.

The award is either made by the arbitrators, or it is the act of the umpire. If it be the latter, it is admitted, that it is valid, notwithstanding the arbitrators have joined with the umpire, because their approbation which is manifested by joining with him, does not render his umpirage, in any degree less the act of his judgment. If the umpirage be not vitiated by the joining of the arbitrators with the umpire, it is clear that the efficacy of the award cannot be diminished by the fact that the umpire has joined with the arbitrators. The award is no less the act of their judgment, because the umpire has concurred with them in their conclusion. As, therefore, the instrument was valid, whether it was the award of the arbitrators, or the umpirage of the umpire, it was unnecessary to allege in the declaration that the arbitrators had disagreed, and that he umpire had acted in consequence of that disagreement.

Indeed it would seem to be, in such cases, perfectly consistent with the intention and understanding of the parties, that the arbitrators with the assistance and approbation of the umpire should make an award, and that being made jointly by them all, it was done in exact conformity with the views and intention of the parties to the submission: *Hunter* vs *Bennison*, (*Hard.* 43.)

Wherefore the judgment is affirmed.

W. C. Bullock for appellant; *Johnson & Throop* for appellee.

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Hayden *vs* Commonwealth.

ERROR TO THE FRANKLIN CIRCUIT.

INDICTMENT.

Case 41.

Misdemeanors. Jurors. Challenges. Prosecutors.

JUDGE GRAHAM delivered the opinion of the Court.

January 4.

The case stated.

This is an indictment against Hayden, upon a charge of stabbing without malice aforethought, in a sudden affray. The punishment prescribed for this offence by the act of 1828, (2 *Stat. Law*, 1301,) is fine and imprisonment in the county jail, at the discretion of a jury, the fine not to exceed five hundred dollars, nor the imprisonment a longer time than one year.

An appeal or writ of error may be prosecuted by defendant convicted upon indictment when the punishment is fine only or fine and imprisonment. (3 *Stat. Law*, 37, *Act of* 1841.)

By the act of 1841, (3 *Stat. Law*, 37,) upon an indictment for a misdemeanor against a free person, whether the punishment therefor is by fine only, or fine and imprisonment, or otherwise, the defendant has the right to appeal, or prosecute a writ of error to this Court. The defendant having, in this case, been committed, and sentenced to pay a fine of twenty dollars, and to be imprisoned three months in the county jail, and having, by the above recited act, the right to appeal, &c., has brought up the case, by writ of error, for revision by this Court.

There are three questions of law involved in the case: 1st. The extent of the privilege of peremptory challenge of jurors; 2d, whether a prosecutor is necessary to be named at the foot of the indictment; and 3d, if so, can the defendant be permitted, after the jury have returned a verdict, to object to the want of a prosecutor. The first two are the only questions of importance to be decided, for we think it is clear, that if a prosecutor be necessary at all, yet, if the defendant postpones his objection on that account until after the jury have returned their verdict against him, he should be held as having waived that objection, and it is then too late to make it.

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HAYDEN vs COMMONWE'TH.

The defendant indicted for stabbing without malice is entitled to challenge 20 jurors peremptorily. (3 *J. J. Marshall* 142: *Ib.* 630.)

We do not feel authorized to regard the first point as now open to investigation. We think it has been conclusively settled by repeated adjudications of this Court that in such a case as the one now before us, the accused is not restricted to the number, three, but has the right, according to the statutes on that subject, to extend his peremptory challenges to twenty jurors: *Montee* vs *Commonwealth*, (3 *J. J. Marshall*, 132;) *Commonwealth* vs *Mitchell*, (3 *J. J. Marshall*, 631.) In the latter case, the Court decidedly express this opinion.

No prosecutor is necessary in cases of stabbing, which is a high misdemeanor; but only in cases of trespass upon the person or property. It is too late to object that there is no prosecutor after the jury have returned a verdict.

As to the second point, the second section of the act of 1818, (1 *Stat. Law*, 542,) enacts, that so much of any law as requires the name of a prosecutor to be set at the foot of an indictment for a trespass or misdemeanor is repealed, "except in cases that relate to a *trespass* upon the person or property of individuals." The terms used in this statute are somewhat of doubtful interpretation, but we cannot construe them to embrace every case of aggravated misdemeanors, such as cutting stabbing, &c., as is the present case. We think the operation of the act should, in its requisition, be confined strictly to indictments for *trespass* on the person or property of individuals, and ought not to be understood as embracing cases of *high misdemeanor*, when the indictment may be regarded as exclusively for the public offence, and not for the private injury. Such being the nature of the offence in this case, it seems to us that no prosecutor was necessary. But for the error in restricting the defendant in his privilege of peremptory challenge, the judgment of the Circuit Court is reversed, and the case is remanded to that Court, with directions to set aside the verdict and judgment, and grant a new trial to the defendant.

Morehead & Reed for Hayden; *Lindsey* for Commonwealth.

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Ford's Executors, &c. *vs* Lewis.

CHANCERY.

ERROR TO THE CHRISTIAN CIRCUIT.

Case 42.

Fraudulent conveyances.

January 7.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

No trust results where the grantor conveys fraudulently though without consideration to evade the payment of his debts. Nor will the Chancellor interfere in such case, but leave the parties where they have placed themselves.

WITHOUT going into any detail of the facts of this vexatious and complicated case, we are satisfied from a laborious investigation of the record, that the arrangement between Lewis and Wm. M. Ford, by which the latter got the possession and the title of a large portion of Lewis' property, consisting of one half of the ferry property, and also of the negroes and personalty in the bill mentioned, was entered into and carried out mainly for the purpose of protecting the property from the creditors of Lewis. This being the fact, no obligation to re-convey, growing out of the transaction, or forming part of it, can either be itself enforced, or form the consideration of an enforceable promise, or covenant written, or parol; and as Lewis wholly fails to make out the statements of his bill ,with regard to the object or motive for placing his property in Ford's hands, and as to the written articles of partnership, of which he exhibits an alleged rough draft. And, as moreover, the bond for a re-conveyance of the ferry property, as spoken of by some of his witnesses, if there ever was such a bond, is not stated to have been founded on any new consideration, and whether it was a separate bond or defeasance, or was a covenant contained in the alleged articles of partnership, or in the rough draft thereof, must be taken to have rested solely, or at least substantially upon the first fraudulent arrangement, if it was not a part of it, a Chancellor could not, without a violation of the principles of law and policy, which declare such an arrangement fraudulent and void, as to creditors, &c., but valid as between the parties, enforce such bond or covenant, and thus aid in carrying out

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FORD'S EX'S, &C. vs LEWIS.

The Chancellor will not enforce any obligation written or parol to re-convey property conveyed fraudulently to avoid the payment of debts.

and effectuating the illegal arrangement. If Ford had re-conveyed the property, the deed passing the legal title must have been respected. But a mere executory contract, founded upon no consideration, or upon one that is illegal, cannot be enforced in equity. And as the fraudulent arrangement though it implies a secret trust as a part of the fraud, repels the implication of a resulting trust, (arising either from a conveyance without consideration, or from the fact that Lewis paid for the ferry, &c., and the bond for title was, by his direction or consent, made to Ford,) there is no ground upon which Lewis can claim, in a Court of Equity, either a re-conveyance, or an account of profits.

This conclusion disposes of the whole case; and we only add that it appears that Ford and his executor have paid large sums of money to and for Lewis, approximating to the value of the property when received; that the negroes and personalty were fully paid for, leaving an excess of advances, which cuts off the account for hire, and that little, if any thing, could properly be charged against Ford's executors for profits of the ferry property while under his management. And from the nature of the relation and confidence between the original parties, it is impossible to arrive at the actual state of the accounts between them; and as, moreover, there is much conflict in the testimony and circumstances referred to, there would seem to be more danger of doing injustice between the parties by attempting a settlement at this late period, than there is in adhering to the principle of law and policy under which the Court will leave the parties to a fraudulent and illegal transaction, in the condition in which they have placed themselves.

Wherefore the decree is reversed, and the cause remanded with directions to dismiss the bill.

J. & W. L. Harlan and *E. M. Ewing* for plaintiffs; *Cates, B. & A. Monroe* and *Robertson* for defendant.

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CHANCERY.
WILLS.
Case 43.

Berry *vs* Hamilton.

ERROR TO THE BATH CIRCUIT.

Wills. Witness.

January 7.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated and points made for decision.

ELIZA ANN HAMILTON died on the 9th day of August, 1844. At the time of her death she was about thirty five or six years of age, and unmarried. Two days previous to the day on which she died, she executed an instrument of writing, purporting to be her last will and testament, containing, among others, the following provisions, viz:

"I will all my servants to be free, both those I am entitled to as an heir of my father, Archibald Hamilton, deceased, at this time, and those that I will be entitled to, as an heir of my father, at my mother's death, and also my portion of the servants of my sister, Maria Hamilton, deceased. And if said servants will go to Liberia, in Africa, I will each one of them one hundred dollars; but if they do not go to Liberia, I will them fifty dollars each, on their permanent removal to a free State. I will that my servants have what they earn, after the first day of January next, that is, over and above their expenses and the expense of attending to them."

"I will and appoint my uncle, John Berry, my executor; and I do leave it entirely at his discretion when my servants shall be free, where they shall go to, and how they shall be employed, and all matters else that I have not stated that concerns them."

"I will that one thousand dollars of my estate be given to educate poor men for the ministry of the Associate Reformed Church, if there be any that place themselves under the the care of the Associate Reformed Presbytery of Kentucky, to be paid at such time as my executor may think best. Or if there be no such

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BERRY vs HAMILTON.

persons needing said money within a reasonable time, then my executor may dispose of it in that way he may think best to promote the cause of the Associate Reformed Church in Kentucky, or elsewhere."

"I will three hundred dollars for my executor to use for benevolent purposes. I have given him directions how and when to apply it."

"I will my uncles, James and John Berry, so much of all my estate, not already named in this will, as will indemnify and keep them safe from all loss, should there be any, as administrators of my father's estate, and also to pay them reasonably for all their time and trouble in attending to and managing my father's estate in the way and manner it has been done."

"I will that the balance of my estate that may be left, after what I have disposed of in this will, be divided among my three brothers, one half of which to be George W. Hamilton's, and the other half to be equally divided between James and A. W. Hamilton."

Eliza A. Hamilton resided in Bath county at the time of her death. The instrument of writing purporting to be her last will and testament, was, after a full investigation of the testimony bearing upon all the questions made in relation to its validity, admitted to record as such, by the Bath County Court. Upon an appeal from that decision, to the Bath Circuit Court, it was held by that Court, that the will was valid as to the personal estate, but was invalid as to the land and slaves, upon the ground that William Berry, one of the two attesting witnesses to the will was an incompetent witness, and consequently that the writing was not executed in the manner the statute upon the subject requires wills to be executed for devising slaves and land. From the decision of the Circuit Court, John Berry, the executor, has appealed to this Court, and the other parties have assigned cross errors; so that the whole case is fully before this Court for determination.

To the proper understanding of the questions made and debated, the following statement of facts is necessary: In the year 1826, Archibald Hamilton, the father

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of the testatrix, died, leaving a large estate, consisting of land, slaves and personalty. He left a widow and five children, namely, Eliza Ann, the testatrix, Maria, Archibald W., James and George. Administration on his estate was granted to Rebecca Hamilton, his widow, and to her brothers, John and James Berry. They executed the usual administration bond, with William Berry and others as their sureties. John Berry, who seems never to have married, resided with his sister, Rebecca Hamilton, after her husband's death, and, as administrator, had the chief management of the estate. No dower was alotted to the widow, nor was the estate divided among the children. The land was not rented out, nor the slaves hired, nor the personal property sold; but the whole estate was kept together, and managed for the joint benefit of the whole family. The business was ably and prudently conducted, and has resulted in a large accession to the estate, in the way of money and property. This mode of managing the estate was adopted by John Berry, as administrator, at the instance of the widow, and those of the children who, at the time, were old enough to have a wish upon the subject. It was continued by him until the death of the testatrix, Eliza Ann, without any objection, so far as appears, by any of the children; and apparently with the assent and approbation of them all. Some few years prior to her death, an attempt was made by the County Court Commissioners to settle the estate with the acting administrator. The settlement, so far as it was progressed with, charged the administrator with the rents of the land, the hires of the slaves, and the value of the unsold personal estate, and with interest on all, regarding him as *legally* the *renter* of the land, the *hirer* of the slaves, and the *purchaser* of the personal estate. The aggregate of these charges formed a very large sum, but the expenditures by the administrator for improvements and the support and education of the family, and his investments of the profits of the farm in lands for the benefit of the estate, were not taken into the estimate, nor was the settlement comp e-

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BERRY vs HAMILTON.

ted. Serious apprehensions, however, seem to have been entertained by the administrator, that he would incur a considerable loss if the estate should be settled upon the proposed plan. Whether any of the younger children required the estate to be settled in that way, does not appear. But the widow, Mrs. Hamilton, the testatrix, Eliza Ann, and her sister Maria, who was then living, said at the time, and afterwards repeatedly told John Berry, that they would indemnify him against all loss on account of the management of the estate, stating that it had been managed satisfactorily, and agreeably to their wishes. Maria died unmarried and childless and intestate, some years before her sister Eliza Ann. The latter, at the time of her father's death, was about eighteen years of age; the other children were all younger than her.

The will under consideration is contested, and its validity objected to,

First, on an alleged want of capacity in the testatrix;

Second, on the ground that its execution was fraudulently procured by John Berry, by the exercise of undue influence;

Third, because William Berry, one of the subscribing witnesses to the will, is the surety of John Berry, in the bond given by him as the administrator of Archibald Hamilton, deceased, and has, therefore, as is contended, an interest in the establishment of the will, which renders him incompetent as a witness.

The testimony shows capacity to make a will.

1. The weight of the evidence is decidedly in favor of the conclusion, that the testatrix was in full possession and exercise of her mental faculties, at the time the will was executed. The only evidence that seems to throw a shadow of doubt upon this conclusion, is that given by a majority of the physicians, who testified in relation to the character of the disease under which she labored, and its invariable effects upon the mind of the patient previous to dissolution. They proved that her disease was tuburcular consumption, and that the death of a patient laboring under such disease is uniformly preceded by phrensy. If this were

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the disease that resulted in her death, about which the testimony is conflicting, still, it does not appear that this state of phrensy had commenced at the time the will was executed. The subscribing witnesses to the will, and the mother of the testatrix, prove that she was in her right mind at the time. Her brother George, who is manifestly opposed to the establishment of the will, states that he saw nothing indicating alienation of mind, but, on the contrary, his sister appeared to be perfectly rational. The will was made two days before the death of the testatrix. The day subsequent to the one on which it was executed, a physician was in attendance, who remained with her until she died. His evidence is mainly relied upon to prove incapacity. He states that previous to her death she had spells of drowsy, dreamy wanderings; that she was extremely weak and worn down with her disease, which was of a very debilitating nature. At what time she was first attacked with these spells of dreamy wanderings he does not state. But he proves that even when laboring under these spells, after she was fully aroused, she appeared to be perfectly rational; that he discovered no disease of the brain, and in his opinion, although weak, she might even then have been capable of disposing of a complicated estate, provided she had previously reflected on the subject.

2. The testatrix was a woman of strong and vigorous intellect. Her opinions were formed with deliberation and adhered to with firmness. She entertained conscientious scruples upon the subject of slavery, but was very decidedly of the opinion that slaves should not be manumitted without previous preparation. She repeatedly expressed her determination that her slaves should never serve any other person but herself. Her intention to emancipate them at her death, was evident from all her conversations on the subject. With her it was not only a desire, but she felt it to be a moral duty.

There can be no doubt that she regarded her uncle John Berry with affection and confidence. He resided for many years in the family, and acted as a parent in

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controlling the business of the estate, and promoting the interest of the children. His advice was heeded and his counsels had their due influence. He had managed the estate in the way the testatrix desired. The slaves, instead of being hired out, had been kept at home and treated with kindness. Their number had increased, and the young had been reared. The land, instead of having been rented out and abused, had been cultivated and improved. The profits arising from the labor of the slaves and the cultivation of the land, had been brought into a common fund for the benefit of all who were interested in the estate. This mode of managing the estate might result in a loss to the administrator, if he should be required to account upon the principles of the attempted settlement. The testatrix felt that such a loss ought not to be sustained by him. His conduct relative to the estate, if not produced by an expression of the wishes of herself and mother, had met with their hearty approbation. That it should eventuate in his loss, was, according to her feelings, manifestly unjust. She therefore expressed her determination, repeatedly, that he should sustain no loss on that account. To indemnify him against this danger, was also, with her, a moral duty, the performance of which she felt to be incumbent upon her.

The emancipation of her slaves, and the indemnity of her father's administrator, are the leading provisions of her will; and from them, the exercise of an improper influence, on the part of her uncle John Berry, in procuring the excution of the will, is mainly inferred.

These two subjects she had deliberated upon when enjoying good health. Her determination upon both had been fully formed and openly and repeatedly avowed. Her fixed resolve to make a will, and not to die intestate, is deducible from her declarations on these subjects. Shortly before her death, she requested a minister of the gospel, who was in the habit of calling upon her daily, to omit his visits for one day, as she had set apart that day to arrange her worldly affairs. He does not certainly recollect it was the day the will

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bears date, that was designated by her. But there is no reason to doubt it. Her brother George had three conversations with her in reference to the execution of a will, in one of which she spoke of emancipating her slaves, and devising to him one half of her estate. There is no evidence that John Berry ever persuaded her to make a will. Her will is in his hand writing, but no implication of an improper influence arises from that fact. It was natural that she should apply to him to write it for her, and that she should consult him in relation to its provisions. From her character, as portrayed by the testimony in the cause, it may be inferred that, as it regards both the execution of the will and the disposition of her estate, she was actuated by a strong sense of duty.

The Chancellor has power and will control a trustee in the exercise of his power to effectuate the purposes of the trust.

But it has been argued that all the provisions of the will, in reference to the emancipation of the slaves and the donations for charitable uses, are so framed as to give to John Berry unlimited power and discretion over these matters, and were really designed by him to operate exclusively for his own benefit; and hence arises, as is contended, another urgent proof of his fraud and improper influence.

This position, however, is wrong in the premises, and must therefore be erroneous in its conclusion. The discretionary power given to him, is in the character of trustee; it must be exercised for the benefit of the objects of the testatrix's bounty, and cannot in any manner be made to operate to his advantage. For the proper exercise of this discretionary power, he is responsible in a Court of Chancery. If he should fail to do his duty, its performance will be enforced by the Chancellor. So long as he retains the slaves in bondage, the proceeds of their labor belong to them. Should he refuse to emancipate them in a reasonable time, a Court of Chancery would compel him to execute faithfully the will of the testatrix. A discretionary power as it regards the slaves, was necessarily vested in the trustee to enable him to effectuate fully the views and intention of the testatrix on the subject of emancipation. So, in refer-

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BERRY vs HAMILTON.

ence to the provisions of the will for charitable purposes; no advantage can result to the trustee by a failure to appropriate the fund as required by the will. If never applied in that way, it will belong to the distributees, and if its application were suspended an unreasonable time, the Chancellor would enforce, on the part of the trustee, a performance of his duty. The assumption, therefore, of the want of capacity in the testatrix, or the procurement of the execution of the will by the fraud, or undue influence, of John Berry, is not sustained by the testimony in the record.

A will to pass land and slaves must be attested by two witnesses. *argu.*

3. The most material point in the cause, relates to the competency of one of the attesting witnesses to the will. Our statute of wills requires that the will, if not wholly written by the testator or testatrix, shall be attested by two or more competent witnesses, subscribing their names in his or her presence. If William Berry, one of the attesting witnesses, is incompetent, the will is not executed, so that the devises contained in it, upon the subject of land and slaves, can have a legal operation. The objection to his competency, is based upon the fact, that he is one of the sureties of John Berry in the bond executed by him as administrator of Archibald Hamilton, deceased. The will under consideration, contains a devise of so much of the estate of the testatrix, as will indemnify John Berry and keep him safe from all loss, should there be any as administrator of that estate.

It is contended, and was so held by the Circuit Judge, that this, according to the true import of the will, is a devise to relieve the administrator from the payment of such sums as he should be found indebted to the estate; and not merely from the payment of the difference in the indebtedness, that might result from a settlement upon the principles the estate was administered by him, and one holding him accountable for profits that might have resulted from an administration of the estate in a mode that was strictly legal. Consequently the surety has a direct interest in the establishment of the will,

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A witness to a will in which it was provided that the administrator of the father of the testatrix should be exonerated from any loss as such, not however exonerating him from any legal liability; Held that the surety of the administrator was not by such provision of the will rendered an incompetent witness to prove the will.

which, in effect, by discharging his principal, releases him from a direct and certain liability.

This construction of the will, violates the language used by the testatrix, and is opposed to her intention, as developed by all the facts which have any reference to the matter. The devise is made to save the administrator from "*loss*," "*should there be any.*" If there be no loss, nothing passes by the devise. There is nothing given to him unconditionally—it is expressly upon the condition that he is subjected to a loss as administrator. If he be required to pay to the heirs, only that which he has received, or realized as the profits of the estate, he loses nothing—he merely pays out what he holds in trust for them. But on the contrary, should he be regarded as the legal purchaser of the personal estate, and the legal *renter* of the land, and *hirer* of the slaves, and be required to account accordingly, and by this operation be brought in debt to the estate for a sum exceeding that which he has actually realized from its management, then the difference would constitute a loss, because he would be compelled to pay that which he had never received. This was the nature of the loss that was apprehended. It was this loss the testatrix declared that he should not sustain, because he had managed the estate according to her wishes on the subject. Whether the administrator, if required to settle the estate upon principles different from those upon which it had been managed by him, would incur any loss, was uncertain. There was, therefore, a propriety in the use of the language by the testatrix, that he was to be indemnified against such loss "*should there be any.*" Had she intended to absolve him from the payment of what he owed to the distributees, as administrator, or which would have been the same, in effect, to devise to him an amount equal thereto, the use of such qualifying language would have been wholly inappropriate. The estate was in his hands unsettled and undistributed. That he had the control, as administrator, of a large estate, to which the distributees were entitled, was a fact clear, certain, and undisputed. Had she in-

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tended then to devise to him so much of her estate as would enable him to pay to the distributees what he owed to them, the qualifying language used, would have been not only unnecessary, but improper; and, instead of saving him from loss, she would have been giving him a sum equal to the amount he had in his hands belonging to the heirs of her father, whatever that might be. The intention of the testatrix, by this devise, was merely to indemnify him against any loss that he might incur, and not to bequeath to him any part of her estate absolutely and unconditionally.

Considering this to be the true import of the will, the question occurs, whether the attesting witness has such an interest in its establishment as renders him incompetent.

A remote contingent interest in the provisions of a will, will not disqualify an attesting witness from proving it; the evidence of disqualification of a witness rests on the objector.

The interest, if any, is remote, contingent, and uncertain, on two grounds. In the first place, it is doubtful whether, under the circumstances, the legal liability of the administrator would, in a Court of Equity, be regarded as exceeding the actual proceeds of the estate. So far as the distributees had an agency in inducing him, in the first instance, to manage the estate in the mode which he adopted, or to continue that course after it was adopted, he would certainly be exempt from all responsibility for not having managed it in a different mode. In the next place, it does not appear, with any degree of certainty, that there would be "*any loss*," if he were held to a strict account for the value of the personal estate, and treated as the renter of the land, and hirer of the slaves. The farm and business of the estate generally, have been conducted by him with unusual skill, prudence and care. The profits have been carefully husbanded, and invested profitably in loans of money and purchases of land. The family have been maintained and educated, the young slaves reared, and the lands considerably improved. If these matters were all taken into the estimate, and the administrator credited by his actual disbursements, and a reasonable and fair value placed upon the land purchased by him, the proceeds of the estate, for aught that

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appears, may exceed the amount with which he would be chargable.

Whether, therefore, there exists any loss is a matter of doubt and uncertainty. If none exists, the surety has no possible interest in the establishment of the will. The interest, which according to the well settled doctrine on the subject, excludes a witness, must be a certain and fixed, and not an uncertain or contingent interest. Whenever the interest is remote and of a doubtful nature, the objection goes to the credit and not to the competency of the witness. And it is incumbent on the party objecting to the testimony, to satisfy the Court of the interest of the witness: *Higgins* vs *Morrison's executor*, (4 *Dana*, 136;) *Anderson's administrator* vs *Irwin*, (5 *B. Monroe*, 488.)

But supposing a loss to exist, and this devise in the will to take effect, what direct and certain benefit can the witness derive from it? Had the testatrix, in that event, had the power to release the administrator from the loss, and such had been the legal operation of the devise, the surety would have had an evident interest in the establishment of the will, as he would thereby, as well as his principal, be released from a direct and certain liability. But the devise to the principal, is of so much of the estate of the testatrix, as is sufficient for his indemnity. The extent of the loss having been ascertained, he would be entitled to the amount by virtue of the devise. The surety has no more interest in the mere augmentation of the estate of his principal under the operation of the devise, than he has in its increase in any other mode. It would hardly be contended that, as surety, he would be rendered incompetent to testify for his principal in another case, because his evidence would have a tendency to benefit the pecuniary condition of his principal, by enabling him to succeed in a controversy, in which he might have been defeated without the aid of such testimony. Unless, then, the surety would have some equitable right to have the fund devised, applied to the payment of this liability, he has no greater interest that his principal should have the

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benefit of the devise, than he has that he should obtain the same amount from any other source. Admitting that a Court of Equity might, inasmuch as the devise was made for a specified object, enforce its application so as to effectuate the intention of the testatrix, it could only do so if it appeared that the administrator was insolvent, or designed a wrongful appropriation of it to some other purpose, to the prejudice of the surety. So that the interest of the surety would depend, not only upon the contingency of a loss, but if a loss was absolutely certain, then upon the additional contingency, that the administrator, before he obtained the benefit of the devise, would become insolvent, which could not well happen, as he would, as the executor, have the whole of the estate devised in his own hands.

The doctrine is well settled, as before remarked, that a remote or contingent interest does not disqualify a witness, but affects his credit only: *Falls* vs *Belknap*, (1 *John. Rep.*, 491;) *Stewart* vs *Kip*, (5 *John. Rep.*, 256;) *Ten Eyck* vs *Bell*, (5 *Wendell*, ;) *Baker* vs *Arnold*, (1 *Cain Rep.*, 276;) *Peterson* vs *Willing*, (3 *Dallas*, 508.) The application of this doctrine in the present case, manifests conclusively the competency of the witness, and the error of the Circuit Court, in deciding that his testimony was inadmissable, and for the want of it, that the will could not be legally established. Both the subscribing witnesses prove satisfactorily the execution of the will. The testimony leaves no room to doubt the capacity of the testatrix. It sufficiently appears that she knew and fully comprehended the contents of the instrument. And in our judgment, the very slight circumstances relied upon to prove fraud, or any undue influence on the part of John Berry, in obtaining the execution of the will, are wholly inadequate for that purpose. We think, therefore, the instrument should have been admitted to record as the last will and testament of the testatrix, Eliza Ann Hamilton, deceased.

Wherefore, the order and judgment of the Circuit Court is reversed and cause remanded, with directions

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to enter a judgment, affirming the order of the County Court establishing the will, and admitting it to record.

Robinson & Johnson for plaintiff; *Apperson* and *Robertson* for defendant.

English *vs* Young. Same *vs* Same.

ASSUMPSIT. COVENANT.

ERROR TO THE HARDIN CIRCUIT.

Case 44.

Practice. Gaming. Voidable covenants.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

January 9.

A paper purporting to be a bill of exceptions certified by the clerk but not noticed upon the record, cannot be noticed by the Court of Appeals as part of the record.

The first of these cases was an action of assumpsit, in which the jury having found for the defendant, a judgment was accordingly rendered in bar of the action. The only further evidence of the action of the Circuit Court, is presented by a statement of the Clerk, copying from his minute book a note of the trial and verdict, and of a bill of exceptions being filed by the plaintiff, which was not noticed on the record book. And to this statement is appended a bill of exceptions, as being the same referred to in the minute book. This bill of exceptions presents the question, which also arises in the second case, whether certain orders drawn by the defendant, directing the plaintiff to furnish store goods to the bearer, to the amount of a specified sum, and promising payment therefor, are covenants which prevented or merged the simple contract, which might otherwise have been implied, to pay for the goods furnished on the defendant's request. We are of opinion, however, that the bill of exceptions is not sufficiently authenticated to be considered by this Court as a part of the record. It was not, in fact, made so by any order of the Circuit Court. That Court might, perhaps, amend its record by the minutes of the Clerk, but until this is done, this Court can neither do the same, nor give to the minutes and to the mere certificate of the Clerk that they are true, and that this is the bill of exceptions referred to therein, the same credit and verity

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English vs Young.

which it would give to the entries appearing upon the record, and verified by the signature of the Court. The danger which might result from our doing so, is too obvious to require specification. Wherefore, the judgment in the action of assumpsit is affirmed.

An order from one person to another to furnish goods of a certain value, containing an express promise to pay for them, is a covenant to pay that sum if the goods be furnished.

In the second case, we are of opinion that although a mere order to furnish goods of a certain value to a third person, might not be regarded as a covenant, such an order with an express written promise to pay the drawee the sum specified, does amount to a covenant to pay that sum if the goods be furnished, and is placed, by the statute, upon the footing of a specialty, upon which covenant or debt could alone be maintained. We proceed, therefore, to notice the other questions arising upon pleas Nos. 3 and 4, and the replications thereto, no question being made as to pleas Nos. 1 and 2, which seem to have been adjudged bad on demurrer.

A third person who pays money or property at the request of one who lost it at unlawful gaming, is not estopped to recover the amount so paid from the person making the request, though he may know that it was so lost.

The third plea avers that the orders sued on were drawn for money lost at gaming, and in favor of the winner, of which the plaintiff had knowledge, and that before complying with them, he was notified not to do so. The replication is, that after this notification the defendant requested the plaintiff to furnish the goods on the orders, and that he did it. This replication was adjudged insufficient on demurrer. And this judgment is attempted to be sustained upon the construction of the first and fourth sections of the act of 1833, (*Stat. Law*, 758–9,) and on the authority of the cases of *Pope's heirs* vs *McKinney*, (3 *B. Monroe*, 93,) and *Lyle* vs *Lindsey*, (5 *B. Monroe*, 123.) But we find nothing, either in the statute or in the cases referred to, which establishes the principle, that if a third person who had no participation in the gaming, afterwards pays the winner, at the request of the loser, either with or without knowledge of the consideration moving the request, he is precluded, by the unlawfulness of that consideration, from recovering against the loser what he has thus paid. It is from the winner, or from the person receiving payment, for the use of the winner, that the statute authorizes the loser to recover back what he

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may have paid. And this Court, in *Lyle* vs *Lindsey*, said that, in paying a debt due from the winner, the loser was paying to his use, and that, as he might recover the amount after it was paid, he might, in equity, resist its payment, and enjoin the enforcement of a judgment for it. But in this case, the loser has not paid, and will not pay the plaintiff, as a creditor of the winner, or for his use, but as his own creditor. And he can no more resist the payment now demanded, than if he had, in his own person and on his own credit, purchased certain goods, or borrowed certain money, from the plaintiff for the purpose of paying a gaming debt, he could resist a demand of payment on the ground that his purpose was known to the plaintiff. In such a case, where the gaming has already taken place, knowledge of the fact does not implicate third persons, as it would, in case of money loaned for the purpose of gaming. The plaintiff can, in no sense, be called *particeps criminis*, and we think his replication is a sufficient answer to the plea. This conclusion is sustained by the cases of *Throckmorton* vs *Greathouse*, (7 *J. J. Marshall*, 16,) and *Bell* vs *Parker*, (3 *Dana*, 51.) The Court, therefore, erred in sustaining the demurrer.

The fourth plea alleges, in substance, that the orders were drawn while the defendant was *non compos mentis* in consequence of intoxication, produced by the artifice of the person in whose favor they were drawn, for the purpose of gaining an advantage, &c. To which the plaintiff replied, that when the orders were presented, the defendant was of sound mind, and then and afterwards requested the plaintiff to furnish the goods and receive the orders, which he did, &c.

A deed voidable upon delivery may be subsequently confirmed.

As, upon the facts stated in the plea, the orders or covenants were voidable only, and not absolutely void, they were susceptible of confirmation. And as the replication shows confirmation after the disability was removed, it is sufficient. It does not, it is true, say that the defendant was perfectly sober when he directed these orders to be paid. But it says that he was then of sound mind, which meets the material point of the

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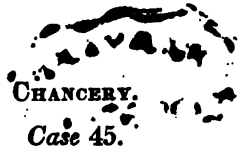
plea. The demurrer to this replication should, therefore, have been overruled, instead of being sustained. Wherefore, the judgment in the case of the action of covenant is reversed and the cause remanded, with directions to overrule the demurrer to the replication to the third and fourth pleas, and for further proceedings.

Riley and *Wintersmith* for plaintiff; *J. & W. L. Harlan* for defendant.



CHANCERY.
Case 45.

Armstrong *vs* Mudd.

APPEAL FROM THE HENRY CIRCUIT.

Grants, construction of. Election. Depositions.

January 9. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

THE obligation, executed by Mudd to his vendee, for a deed to the land sold, contains land, which it is contended, is different from that described in the deeds under which the vendor claims. Those deeds do not fix, with exact certainty, the land which they include. They purport to convey two hundred acres of land to be bounded as follows, viz: beginning at an elm and two beeches, the most southwardly corner of James Patton's, Benjamin Pope's, and Mark Thomas', eight hundred and fifty-three acre survey, that joins James Patton's eight thousand four hundred acre survey; thence with their line, so far as to make one side of the said tract of two hundred acres hereby conveyed; thence, in such course and directions, as will cause the said quantity of two hundred acres of land to be in a parallelogram, or which shall not be more than twice as long as it is wide. The beginning corner, in the deeds, is the same that is called for, as the beginning corner, in the patent from the Commonwealth; and the boundary in all the deeds is precisely similar, including the one executed by the patentee, down through several conveyances, to the one executed to Mudd, the present vendor.

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The two hundred acres of land sold by Mudd, and which he has bound himself to convey to his vendee, is described by a boundary, beginning at the same corner, and running with the line of the patentee one hundred and sixty poles; thence, at right angles two hundred poles; thence, at right angles, one hundred and sixty poles, to the line first called for in the deeds; thence, with that line, two hundred poles to the beginning. The land, thus bounded, has a base line of two hundred poles on the line called for in the deeds, and its location, in this form, is certainly consistent with the boundary therein designated. The question then is, had Mudd a right, holding under these deeds, to give form and locality to the two hundred acres which they conveyed?

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The general rule is, that of every thing uncertain which is granted, election remains to him to whose benefit the grant was made to make the same certain. (*Viner's Abridgement, vol.* 14, *page* 49.) And a description in a grant, which can be made certain, is sufficient, and the land will pass to the grantee: (*Sheppard's Touchstone, vol.* 1, 250.)

Where there is an uncertainty in a grant and an election in it with the grantee: (*Vin. ab.* 49.) And that is certain which may be rendered certain: (1 *Shep. Touch.* 250.)

According to this doctrine, as the description of the land would be rendered certain, these conveyances passed the title to Mudd; and as none of the previous vendees had exercised the right of election, it passed to him, also, as an incident to the title. When he had the land surveyed, and sold a certain boundary that was consistent with the description contained in the deeds, the act of thus selling amounted to an election, and rendered the form and boundaries of the land conveyed certain, although it had been previously uncertain. The objection to the title, on this ground, cannot, therefore, be sustained as valid.

As it regards the conflicting claim in the name of L. Wheeler's heirs, it is only necessary to remark that, although an interference is proved to exist between the claims, and the claim is also proved to cover a part of the land sold, yet as it does not appear that Wheeler's heirs have any title to the land claimed by them, or ever had

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actual possession of any part of the interference, their possession and that of those persons under whom they claim, having been outside of the interference, cannot be made available against Mudd or his vendee, who hold a title to the land, regularly derived from the Commonwealth.

And if the claim of J. Wheeler interferes with the land sold, as the extent of that interference was not shown, and it may not include the one thousandth part of an acre, the Court very properly disregarded the testimony, that *some part* of the tract sold, had been enclosed and held in possession for many years under the claim of John Wheeler.

A party filing exceptions to depositions should ask a decision upon the exceptions: if this be not done they will be taken by the C. A., to have been waived.

No disposition having been made by the Court of the exception filed to the deposition of a witness, it must be deemed to have been waived. If a party filing an exception to a deposition intends to rely upon it, he must bring it before the Court below, and have some action upon it there, or it cannot be noticed in this Court, but it will be presumed to have been waived by the party that filed it.

The Court had jurisdiction to enforce the vendor's lien for the payment of the purchase money, or in other words to decree a specific execution of the contract. And as the vendor retained the legal title, the land was liable, in the hands of sub-purchasers, for the balance of the purchase money unpaid. As a Court of Equity had jurisdiction, it was not necessary a judgment at law should have been obtained, much less that an execution should have been returned no property found, previous to the application, by the vendor, to the Chancellor for the enforcement of his lien.

Wherefore, the decree is affirmed.

Armstrong for appellant; *McHenry* for appellee.

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Lawson's Adm'rs. *vs* Hansborough, &c.

CHANCERY.

ERROR TO THE SHELBY CIRCUIT.

Case 46.

Distribution. Administration.

JUDGE SIMPSON delivered the opinion of the Court.

January 10.

Case stated.

THIS bill was exhibited by Lawson's administrators for the settlement of the estate of their intestate. In it they allege that after making a cursory examination of the debts against the estate, and the assets belonging to it, they supposed there would be property enough to pay off all the debts, and accordingly proceeded to make payment to many of the creditors of the full amount of their debts. That since these payments were made, they have ascertained there will be a deficiency of assets; which deficiency is, in a great measure, produced by their inability to collect a large debt, which they felt confident would be realized, and under that conviction made the payments referred to; but which, by the insolvency of the payers, has turned out be wholly unavailable. They made the creditors, whose debts they had paid in full, defendants to their bill, and prayed that they might be decreed to refund to them, so much of the amount paid them, as exceeded the sum to which they would be respectively entitled, by a *pro rata* division of the assets among all the creditors.

Point for decision.

For the purpose of having a decision of the question, whether the creditors who have received full payment of their debts, can be compelled to refund according to the prayer of the bill, the parties admitted, "that the administrators had, before the bill was filed, paid to the defendants more than their ratable share of the estate, under a belief that the estate would be sufficient to discharge all the debts, and that it appeared the estate would not be sufficient, owing to the failure of anticipated debts due to the estate; that the administrators are

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LAWSON'S AD'S. vs HANSBOROUGH &C.

solvent, and that there was no fraud or collusion on the part of the administrators, or on the part of the debtors who received full payment of their debts." Upon these facts the Circuit Court decided that the creditors were not in equity bound to refund, and from that decree the administrators have appealed.

By the first section of the act of 1839, (3 *Stat. Law*, 240,) all debts are declared to be of equal dignity in the administration of estates, and are required to be paid ratably, in proportion to their amounts, by the executor or administrator, when the personal effects are not sufficient for the payment of all the debts against the estate; and it is enacted, that should more than the ratable share of any debt be paid, the executor or administrator shall only receive credit, in the settlement of his accounts, for its proper proportion.

By the fourteenth section, it is provided, that nothing in the act shall be construed to prevent an executor or administrator from paying the debts, at his *own risk*, when he deems the estate sufficient to pay all the debts of the decedent.

There is no part of the statute that authorizes an executor or administrator to reclaim any part of the money, he may expend in the payment of debts, when he deems the estate sufficient to pay all the debts, and there proves to be a deficiency of assets. It is evident that the statute affords him no aid, in such a case, but rather negatives his right to relief, by expressly declaring, that such payments shall be made at his *own risk*.

When administrators pay debts in full to a portion of the creditors, and the estate proves deficient, they cannot recover in equity of such creditors any surplus so paid over what would have been their *pro rata* share of the estate, tho' there was no fraud, but a want

Cases may occur in which an executor or administrator would be entitled to relief. But to have a good title to such relief, it is indispensible that there should have been no negligence on the part of such an executor or administrator, and that he should have acted with due caution in the payment of the assets. The mere fact that he labored under a mistake at the time, in reference to the sufficiency of the assets for the payment of the debts, does not give him a right to the interposition of a Court of Equity. The mistake may have resulted from his own negligence in not using the

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requisite diligence in ascertaining, either the amount of available assets, or the debts for which the estate was liable.

of the proper vigilance in ascertaining the am't. of the estate.

In this case the implication is strong, from the statements made by the administrators in the bill which they exhibited, that the mistake was the result of their own negligence. Their allegations are, that they made a cursory examination of the debts against the estate, and the assets belonging to it. They continued, under a belief that the assets were sufficient to pay all the debts, to make payments, until the amount paid out greatly exceeded all the available means belonging to the estate. That this arose, in part from a failure to keep an account of the sums paid out, and from a conviction that a debt of ten or twelve hundred dollars, due to their intestate, would be realized, but which turned out to be wholly unavailable. These are the only reasons assigned for their failure to file a bill in chancery under the statute for a settlement of the estate. They do not pretend that they made a careful and scrutinizing examination of the debts and liabilities, and of the amount of assets belonging to the estate, with a view to ascertain its solvency. They do not explain why they believed that the large debt alluded to would be realized, nor do they state that it was lost without any negligence on their part. That the individuals who owed it were solvent at the time they undertook the administration of the estate, and afterwards became suddenly insolvent is not alleged—and upon what their conviction of its availability was founded, does not appear. Their case is not helped by the admission of facts contained in the record. The substance of the admission is, that in paying the debts in full, they acted under a mistake in reference to the sufficiency of the assets, and there was no fraud or collusion on their part. The manner in which the mistake was produced is not admitted; and as it appears from the statements in the bill to have been the consequence of their heedlessness and want of caution, the debts

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LAWSON'S AD'S. vs HANSBOROUGH &c.

paid by them were, in the language of the statute, payments made at their *own risk*.

It has been decided, in the State of Massachusetts, *Walker* vs *Hill*, (17 *Mass. Rep.*, 386,) that an administrator or executor, who has paid debts under a mistaken belief that the estate was solvent, may recover back from the creditors the difference between the sums they had received and the amount to which they are entitled ratably, if the estate prove to be insolvent. Although it may be inferred, from the opinion of the Court in that case, that their statute for the administration and settlement of estates is, in many of its leading provisions, similar to ours, yet there may, and probably do exist, some distinctive features in the two statutes which demand a different rule to prevail in relation to the question in this case. Our statute certainly contemplates a class of cases where the executor or administrator will pay the debts at his own risk, although he may deem the estate sufficient to pay all the debts of the decedent. There would be no propriety in the language used by the statute, nor would it be allowing to it any meaning, if an exposition be given to it by which a mere mistaken belief entertained by the executor or administrator, as to the sufficiency of the assets, no matter how it originated, or what cause produced it, will authorize the reclamation of the money, so far as it exceeds the ratable share of the debts paid.

The case, under our statute, differs essentially from that at common law between executor and legatee, where the former, having paid all debts known to exist, paid the legatee under a supposition that the assets were sufficient; and afterwards, debts which were at the time unknown were demanded. The executor in such case was compelled to pay the debts, notwithstanding he had paid the legacy. And as the claim of the legatee was subordinate to that of the creditor, it was equitable and just that he should refund to the executor. But a different principle prevailed as to creditors, who, as a general rule, could not be compelled to refund debts paid to them by the executor, although the

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debt paid was a simple contract debt, and there were outstanding debts of superior dignity sufficient to exhaust all the assets. The reason was, that the executor, by reasonable diligence, could always protect himself from loss, and if he paid a simple contract debt, knowing the estate in his hands was not more than sufficient to pay debts of superior dignity, it was done of his own wrong, and he could not reclaim the money. If he exhausted the assets in the payment of debts, as he was only required to respect the dignity of debts, so far as he had notice of the demands against the estate, the subsequent prosecution of an unknown debt, even if some of those which he had paid were not of equal dignity, did not render him liable for the debt of which he had no knowledge, and the loss had to be sustained by the negligent creditor.

Although our statute has removed the inequality which existed at common law among creditors, yet the rule of equality and ratable payments which it prescribes, applies only to known debts, and in this respect, leaves the executor upon the same ground which he occupied at common law: *Commonwealth* vs *Richardson, et. al.*, (8 *B. Monroe*, 85.) There is no reason, then, for the application, in this case, of the doctrine of the common law, in cases between creditor and legatee, but that which prevailed between executor and creditor would seem to be more appropriate.

We would not, however, be understood as adopting the doctrine of the common law, applicable to either of the cases mentioned. We have determined this question upon the case presented in the complainant's bill and the agreed facts, with reference to the provisions of the statute, and those general principles of equity which bear upon it, and are clearly of the opinion that the administrators are not entitled to a decree requiring the creditors to refund the money paid to them.

Wherefore, the decree is affirmed.

Cates for plaintiffs.

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T. V. A.
Case 47.

Calvert, &c. *vs* Stone.

APPEAL FROM THE CALDWELL CIRCUIT.

Sheriffs. Trespass.

January 11. JUDGE GRAHAM delivered the opinion of the Court.

The case stated. THIS is an action of trespass, by Stone against the plaintiffs in error, for breaking and entering the dwelling house and kitchen then in Stone's peaceable possession and occupancy. The trial was had on the general issue, with leave to give in evidence all matters which could be specially pleaded. On the trial, the plaintiff proved that some time before day light, or about day break, a negro called at his house for some spirits. That plaintiff and his son and the witnesses got up. The son went into the kitchen, and shortly afterwards called to his father that a man was there and had drawn a pistol on him. The plaintiff immediately got his gun, went out of the side door into the passage with his gun in his hand. The passage spoken of is an open passage between two rooms, and is not closed at either end of it. Immediately on the plaintiff's entering into the passage, some of the defendants seized him and took first his gun and then a stick from him, throwing him on the floor twice in the course of the struggle. There is an outer door leading from the passage into a room of the house. This door was locked. Stone refused to open it, or to give the key to Calvert. The latter declaring that he had authority to break locks and force doors, did, although forbidden by Stone, force open the door by breaking the hasp and one screw and drawing the others. All the other defendants were summoned by Calvert to go with him to the plaintiff's house.

Judgment of the Circuit Court. During the trial, the Court refused to permit the defendants to prove all the conversation between Calvert and Stone, *so far as that conversation related to any au-*

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thority in Calvert as an officer, and also would not permit Calvert to read, as evidence to the jury, an execution of *fieri facias* against the estate of Stone and wife, and a written authority from Tinsly, Sheriff of Caldwell, empowering Calvert to levy said execution on the negroes of Stone and wife. The jury rendered a verdict for plaintiff for $200, and the Court gave judgment according to the verdict. The defendants moved for a new trial. Their motion having been overruled, they have, by appeal, brought the case to this Court. The propriety of excluding the evidence offered, is the principal subject of enquiry before this Court.

A Sheriff sued in trespass must show that he is Sheriff, if he would justify.

It seems to us that the Court did not err in rejecting it. In the first place, it may be remarked that the record does not show that any evidence was adduced, or offered to be introduced, to prove that Tinsly was the Sheriff of Caldwell. Second, if that fact should be taken as not having been controverted, then there was no testimony that he had given to Calvert the written authority purporting to be signed by him. Third, if all this had been done, and if he has, by law, authority to constitute a special deputy to levy a *fi. fa.*, yet he could give to his deputy no greater powers than he himself possessed in the execution of the *fieri facias*. Would the execution have protected Tinsly, had he been guilty of the acts proved against Calvert? That a Sheriff or other officer with a writ of *fieri facias* in his hands has no right to force a lock, or break open the outer door of a dwelling house, in order to levy on property within the house, has been so long and so repeatedly settled as law, that we will not cite authorities in support of the position. The testimony shows that the door broken open by Calvert, was the outer door of the plaintiff's house. The fact that it opened into an open passage, cannot affect the case. It does not appear from the proof that there is any other outer door to the house than the one which was broken. If this door had led into an open porch in front of the house, it would, we suppose, not be denied that the door was the outer door. The passage of the plaintiff

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CALVERT, &c. vs STONE.

is unclosed at either end; it is an open passage answering to the purposes of a porch to the room on each side of it. We think the Sheriff himself would not have been authorized to force his way through it, against the consent and command of the occupant, for the purpose of levying an execution on any property of the plaintiff to satisfy the *fi. fa.* Of course his special deputy could not lawfully do that which the law forbids his principal from doing. There is no proof whatever that Calvert, or any one with him, pretended to make known the object of his visit, or the authority, if any, under which he was acting, until after the altercation, and scuffle with the plaintiff; nor until Calvert demanded the key of the door.

It is also assigned as a ground of reversal, that the Court erred in refusing to give to the jury instructions asked for by defendants. No instructions, either given or refused, are copied into the record, and this Court must presume in favor of the action of the Circuit Court, if any there was, on this subject. We suppose, from a statement made in the bill of exceptions, that the Court was asked to instruct the jury to find the defendants not guilty of a trespass to the plaintiff, if they acted in obedience to Calvert's summons. It is sufficient response to this objection, to say that it does not appear, as before stated, that Calvert had any authority to summon them.

Can a Sheriff, by written authority, constitute a special deputy to levy a *fi. fa.* *Quere.* If so, he can give him no greater power than himself. He cannot break locks of outer doors of a dwelling to levy a *fieri facias*.

Whether the principal Sheriff had authority to appoint a special deputy to levy the execution in his hands, is very questionable. A writ of *fieri facias* is not original or mesne process, but is final process, and is not embraced by the act of 1828, (2 *Stat. Law*, 1469,) which authorizes Sheriffs, in certain cases, to empower discreet persons to excute original or mesne process. At common law he could do so. Whether he has now such power under our statutes, is very questionable, or if he has such power, then, as the statute (2 *Stat. Law*, 1457,) expressly provides that, before any person enters upon his office of Sheriff or *under Sheriff*, he shall, in open Court, give assurance of fidelity to the Common-

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wealth in the form prescribed by the constitution, and shall also take the oath of office prescribed by that act, it may well be doubted whether such appointment would protect him until he had conformed to the requisitions of that act previous to entering upon the duties of his office. It is, however, unnecessary to decide this point. We leave that an open question. For be that as it may, as already shown, the defendants in this action did not, by proof, show themselves, or either of them, entitled to protection by valid authority from the Sheriff of the county. The trespass committed in disturbing the plaintiff and his family in the night time, breaking, by violence, his outer door, and entering into his house against his consent, was of so aggravated a character as not to permit the verdict to be disturbed because of excessive damages. We do not perceive any error in the judgment of the Circuit Court, either in excluding the evidence, refusing a new trial, or in any other particular. The judgment is therefore affirmed.

B. & A. Monroe for appellant; *J. & W. L. Harlan* for appellees.

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98 466
99 388

10bm 155
104 317

Carson *vs* Osborn.

DEBT.

APPEAL FROM THE CALDWELL CIRCUIT.

Bankrupts. Pleading. Issues immaterial.

Case 48.

JUDGE SIMPSON delivered the opinion of the Court.

January 12.

THE promise of a discharged bankrupt to pay a previous debt, although valid, does not revive his liability upon the note evidencing the debt, or enable the creditor to bring a suit upon it, but he is liable alone upon the new promise, and the suit must be brought upon it: *Egbert* vs *McMichael*, (9 *B. Monroe* 44,) *and Graham* vs *Hunt*, (8 *B. Monroe*, 7.)

The promise of a discharged bankrupt to pay a note given before bankruptcy does not revive the right of action upon the note: (8 *B. Monroe* 7; 9 *Ib.* 44.)

As the suit, in this case, was brought upon the note, and the defendant filed a plea, relying upon his discharge in bankruptcy, the replication setting up a sub-

The filing a replication after demurrer to plea overruled is a

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CARSON vs OSBORN.

sequent promise by him to pay the debt, in the note mentioned, was an insufficient answer to the plea, and the demurrer to it should have been sustained. But as the defendant filed a rejoinder to the replication, it must be regarded as a waiver or virtual withdrawal of the demurrer, and leaves him in the same condition he would have been had the demurrer never been filed: *Patrick* vs *Conrad*, (3 *Marsh.* 613.)

waiver of the error of the Court in overruling the demurrer: (3 *Marshall*, 613.)

One of the assignments of error, however, brings in question the propriety of rendering a judgment against the defendant upon the verdict finding the issue in favor of the plaintiff. The issue made between the parties was, whether the defendant had, after he became a bankrupt and was thereby discharged from all liability on the note upon which the suit had been brought, promised to pay the debt, as alleged by the plaintiff in his replication. By the verdict of the jury, it was determined that such a promise had been made by him. But as that promise did not revive his original liability upon the note, the fact established by the verdict, did not authorize the Court to render a judgment upon it against the defendant. The issue tried was wholly immaterial, and the verdict of the jury, giving to it all the effect to which it is entitled, cannot sustain the judgment for the plaintiff: *Crozier* vs *Gano and wife*, (1 *Bibb*, 257.)

The Court cannot properly render judgment upon the finding of an issue for the plaintiff, which is immaterial: (1 *Bibb* 257.)

Wherefore, the judgment is reversed, and cause remanded, with directions to set aside the verdict, and allow the plaintiff to amend his replication, or to file a new one, and for further proceedings consistent with this opinion.

Craddock, Cates, and B. & A. Monroe for appellant; *J. & W. L. Harlan* for appellee.

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Grace *vs* Mercer, &c.

CHANCERY.

APPEAL FROM THE CALDWELL CIRCUIT.

Case 49.

Mortgages. Sales of mortgaged property.

JUDGE GRAHAM delivered the opinion of the Court.

January 12.

Case stated.

ON the 22d December, 1843, Mercer executed a mortgage to Flournoy on seventeen slaves, to secure the latter, as his surety, in a debt of $2000, due to Cruce, and a debt of $1500 to the Bank of Kentucky. Flournoy was also security for Mercer in a replevin bond to Parker, the principal and interest of which amounted to about $500. Flournoy paid of the Bank debt $750, and Mercer afterwards repaid him $75.

The pleadings and proof, in this cause, present the following state of facts, in addition to those above mentioned. The replevin bond to Parker was due. An arrangement was made by which Isaac Gray advanced $500 to Mercer, taking McNary as security in a note for its payment on a particular day, and taking also from Mercer an absolute bill of sale for a negro man named Peter, but the bill of sale to be void if Mercer should pay the money when it would become due. Flournoy agreed that if Mercer did not pay the money, as agreed upon, then, as he was to be benefited by the arrangement, he would release the lien, which, by virtue of his mortgage, he held on Peter, who was one of the slaves included in the mortgage. The money received from Gray was appropriated to the payment of the Parker debt. Mercer did not pay the money on the day it became due, but shortly afterwards obtained it from W. Gray, to whom a bill of sale of Peter was likewise made, and that to Isaac cancelled, he having, by the last arrangement received his money. Mercer being unable to pay William Gray the money borrowed from him, another arrangement was entered into, by which J. W. Kilgore, with Samuel Kilgore and Garrett

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GRACE vs MERCER, &c.

Gray as his sureties, gave a note to William Gray for the sum due to him, and thereby released the negro from his lien, and the bill of sale to William Gray was transferred to Kilgore, with the distinct understanding, as proved by Mercer, that it was only to operate as a security, and if Mercer paid the money, the bill of sale was to be delivered back to Mercer. The possession of the negro never accompanied the bills of sale, but always remained with Mercer. Whether Flournoy continued his agreement with each of these lenders, to release his hold on Peter, is not distinctly shown in the proof. Mercer, through Watson, paid Wm. Gray $200 of this money. Preston Grace having obtained a judgment for $760 86 against Mercer, (which sum was due to him as he charges in his answer to Flournoy's cross-bill, for money paid by him, as one of Mercer's securities, in the aforesaid debt to the Bank,) he caused an execution on this judgment to be levied on the said negro man Peter. Kilgore claimed the property, but a jury summoned to try the right, found the negro subject to execution for Mercer's debts. He was accordingly sold, and Grace, being the purchaser, took possession of him, and has continued to hold him since the sale. Before the levy was made on the negro, by the Sheriff, Flournoy told Grace and the Sheriff that, so far as his mortgage was concerned, Grace might go on; that he, Grace, would only have to contend with Kilgore's claim, and he would raise no objection to his levying and selling the slave, and would set up no claim to him. The negro was not sold subject to the mortgage but absolutely. Such being the state of facts, Grace filed his bill in chancery asking a decree to be quieted in his title, and for general relief, &c. Flournoy answered, insisting on his mortgage lien, and asking a decree to sell Peter, but making no prayer for a foreclosure of his mortgage, nor giving any account, whatever, of the other sixteen slaves. He made his answer a cross-bill against Mercer and Grace. The latter, in his answer thereto, asks that Flournoy be precluded from setting up his mortgage as to Peter. The bills, answers,

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depositions, &c., exhibit, in substance, the facts already detailed. The Circuit Court, on final hearing, dismissed the complainant's bill, and decreed that Peter be sold to satisfy the amount due to Flournoy on his mortgage. The complainant has, by appeal, brought the case to this Court.

A mortgagee who consents to a sale of mortgaged property, or who stands by and sees it levied upon without asserting his claim will be precluded from asserting title against a purchaser thereof.

But little need be said as to the bills of sale. Possession never having accompanied them, but continuing with Mercer, they were certainly fraudulent and void as to his creditors, and can constitute no obstacle to the relief sought for in the bill. If Flournoy is not, by his conduct and declarations, precluded from asserting a lien on Peter, his bill, or rather cross-bill, was not properly framed. Grace, by his purchase of Peter, acquired such an interest as to require Flournoy to foreclose his mortgage on the slaves conveyed therein, and if Peter must be sold to satisfy the sum due to Flournoy, then Grace, as to the sum paid for the negro, and as co-security in the debt to secure the payment of which the mortgage was executed, would probably have had a right to be substituted for Flournoy as to the property remaining unsold. At any rate, he ought to have shown what was done with the other slaves. But Flournoy was not entitled to any decree to sell Peter. The permission given by him, that the negro be levied on and sold, and his declarations before the levy, that he would not set up his mortgage, nor assert claim as to Peter, and the fact that he did not set up his mortgage, but permitted the property to be sold absolutely and not subject to it, completely estop him from now resisting the purchaser's claims. He expressly advised and sanctioned the levy and sale, and thereby induced a purchase, which perhaps would not have been made, had he then insisted on his lien. His cross-bill ought, therefore, to have been dismissed. The claims set up by the defendants to the slave Peter, were such as to give to the complainant reasonable ground to apprehend that he might be subjected thereby to future inconvenience. So long as such claims hung over the property, they would injuriously affect the negro's value when offered

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COMMONW'LTH FOR COLEMAN vs HUGHES.

for sale. It seems to us that the complainant was entitled to relief.

The decree of the Circuit Court is, therefore, reversed, with directions to render a decree, releasing the slave Peter from the claims of any of the defendants, and dismissing Flournoy's cross-bill with costs.

Craddock and Cates for appellant; *J. & W. L. Harlan* for appellee.

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DEBT.

Case 50.

Commonwealth for Coleman *vs* Hughes.

ERROR TO THE UNION CIRCUIT.

Pleading. Variance. Joint and several obligations.

January 15. JUDGE SIMPSON delivered the opinion of the Court.

An obligor may be sued by the name in the bond on which the suit is brought.

THE names of the defendants are stated in the plaintiff's amended declaration just as they were written by them to the bond upon which the suit was brought, and it is well settled that an obligor may be sued by the name in the bond, whether it be his full name or not; and if the declaration be against the defendant in his right name, though it varies from that in the process, he cannot, even at common law, plead in abatement: (1 *Chitty's Pleadings*, 486.) And if it cannot be pleaded in abatement, it certainly is not available upon general demurrer.

Declaration *vs* W. G. Hughes & Phi Berry, writ issued *vs* W. *alias* Willis G. Hughes & Phi *alias* Philander Berry, there is no variance or misnomer which is available on demurrer or for misnomer.

But under our statutes regulating civil proceedings and the disregard of mere technicalities consequent upon the liberal practice which they have introduced, the objection made in this case, to the variance between the process and the amended declaration is immaterial, and should have been totally disregarded, if it can be denominated a variance at all. The defendants in the declaration are sued as W. G. Hughes and Phi. Berry, agreeably to their signatures to the bond. The process issued against them as W. *alias* Willis G. Hughes and Phi. *alias* Philander Berry. This is clearly neither a substantial variance, nor a misnomer. And even if it could have been so considered by the strict rules of the

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common law, it cannot be looked upon as any thing else than a mere technical objection, made for the purpose of delay, and one which, under our statutes dispensing with many of the formalities in pleading required at common law, has no weight, and is not entitled to any consideration whatever.

But although the demurrer to the declaration is said to have been sustained by the Court below, on account of this supposed variance between the declaration and the process, other objections are now urged to it, which it becomes necessary to consider.

In an action against the sureties of a constable for failing to collect and pay over money upon an execution it is necessary to aver that the liability occurred during the time in which the defendants were bound as sureties; i. e. the two years.

The defendants are sued upon a bond executed by them on the 16th of May, 1842, as the sureties of a Constable. By the law then in force, Constables remained in office for the period of two years and no longer. It is contended that the plaintiff's declaration contains no allegation of any breach of the bond within the two years. So far as the plaintiff has attempted to charge a breach growing out of the collection by the Constable, and his failure to pay over the amount of certain specified executions, the objection seems to have been well taken. This breach is alleged to have occurred on the — day of ——— 1844, but whether before or after the expiration of the two years does not appear. The dates and the return days of the executions are stated, and it is averred that they came to the hands of the officer while they were in full force. But, as the return day in both executions was subsequent to the expiration of the two years, the averment may be true, and yet the executions may never have reached the hands of the officer until the liability of the defendants on the bond executed by them, had ceased and determined. It is also averred that the executions were delivered to him for collection while he was acting as Constable. But as he might have been re-appointed, and have continned to act as Constable, it does not necessarily follow, from this allegation, that he received them during his continuance in office, under his appointment made at the time the defendants executed the bond upon which this suit was brought.

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But an averment that the executions were placed in the hands of the constable within two years from the date of his bond, and collected by him during his continuance in office is sufficient.

There is, however, one breach in the declaration which we deem substantially good. It is alleged that the relator of the plaintiff, on the 10th day of November, 1843, delivered to said Constable, for collection, certain enumerated debts, which were afterwards, viz: on the — day of ———, in the year ——, and during the time of his continuance in said office, collected by him as Constable aforesaid. As it appears that these debts were placed in his hands for collection within two years after the date of the bond, it seems to us the allegation that they were collected by him during the time of his continuance in office must be regarded as having reference to the two years then unexpired, and is equivalent to an averment that the debts were collected within two years from the time of his appointment in May, 1842.

But it is also contended, that the breaches are all defective because the death of the Constable was averred, in the plaintiff's declaration, to have occurred before the commencement of the suit, and there is no averment that the money which he collected had not been paid to the relator of the plaintiffs by his representatives, after his death.

This was an action of debt upon the bond, for the penalty, against the surviving obligors, the Constable having died. The declaration, in setting out the breaches of the condition, alleged that the officer, after having collected the debts placed in his hands for collection, failed and refused to pay the money over to the relator, and that the defendants failed to pay the same, although often requested, &c., whereby they became liable to pay to the plaintiff, for the use and benefit of the relator, the penalty of the bond; yet said defendants, although requested, had not paid the same to the plaintiff, nor did the said Dickey, the Constable, in his lifetime, pay the same.

In an action of debt on a constable's bond against the sureties after the

The declaration showed a breach of the condition of the bond by the Constable in his lifetime. For that breach, the remedy at common law, the bond being joint, was against the surviving obligors alone. No ac-

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tion at law could be maintained against the executor or administrator of the deceased joint obligor. Consequently, it was unnecessary to aver, in an action against the surviving obligors, that the demand had not been paid by the representatives of the deceased obligor. Indeed, where one of the parties originally bound was dead, it was not necessary to notice him in the declaration, or to declare against the survivors, as such, but they might be sued as if they alone were the parties principally liable: (1 *Chitty's Pleading*, 49.) A remedy, in such a case, it is true, has been given by statute against the representatives of the deceased joint obligor; but this cannot be considered as having the effect of changing the law as to the mode of declaring against the surviving obligors, when the suit is brought against them. This objection, therefore, to the plaintiff's declaration must be disregarded.

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death of the principal, it is not necessary to aver the non-payment of the penalty by the representatives of the principal, nor was it necessary to notice in the declaration the death of the principal, as the bond was joint and several. (1 *Chit.* 49.)

And as the demurrer was general, and the declaration contained one good breach, the demurrer should have been overruled, and it was erroneous to sustain it to the whole declaration.

Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Jeff. Brown for plaintiff; *Morehead & Reed* and *J. & W. L. Harlan* for defendants.

Phillips *vs* Pope's Heirs.

ERROR TO THE MERCER CIRCUIT.

EJECTMENT. 10bm163 110 636

Case 51.

Limitation. Statute's construction. Conveyances.

January 15.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated, and questions presented for decision.

THIS action of ejectment was brought, on the demise of the heirs of Mrs. Frances Pope, to recover land embraced in a deed made in 1823, which purports to convey to E. B. Gaither all the land devised to said Frances by the will of her first husband, M. Walton, of

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which the land in contest is a part, and under which deed, as passing the title of Mrs. Pope, the defendants claim.

It appears that Mrs. Pope died in 1843, having had no children by the marriage; that her husband, John Pope, died in 1845, and that this action was commenced in 1848, within three years after the death of the husband, but not until about five years after the death of the wife. Upon an agreed case, stating these and other facts involved in the action, a judgment was rendered for the plaintiff. And, in this Court, two principal questions are presented, the decision of either of which in favor of the defendant, will not only reverse the judgment, but will, in its consequences, as admitted on both sides, defeat the action. These questions are, 1st, whether the deed to Gaither is sufficiently authenticated to pass the title of Mrs. Pope, and 2d, whether if it be not the act of 1840, "to amend the law limiting actions for the recovery of land by females and their heirs," (3 *Stat. Law*, 413,) applies as a bar to this case. We shall consider this second question first.

The provisions of the act of 1840 bearing on this case.

The title of the act has been already stated. It proceeds to enact:

"SEC. 1. That all suits and actions hereafter instituted for the recovery of land, or the possession thereof, by any female, or her heirs—when such feme has or shall hereafter, jointly with her husband, execute a deed for the conveyance of her right of inheritance to the same—on the ground that the officer before whom such deed has been or shall be acknowledged, has only certified that the feme has relinquished her right of dower; or on account of such deed's not having been lodged for record, in the proper office, in due time; or on account of a defect in the authentication of such deed, when the same has been or may hereafter be executed, in or out of the State of Kentucky; or for the want of a *dedimus potestatum*, or commission to take the acknowledgement of the same; or on account of the want of a proper authentication, or record of a power of attorney under the authority of which the deed has been

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or may be executed, shall be commenced within three years next after such feme has or shall become discovert, or next after the death of the husband, in case he survives her: *Provided*, that when such feme shall die before she becomes discovert or before the time has run out after she becomes discovert for her to sue, and leaves heirs laboring under the disability of coverture, lunacy or infancy, they shall be allowed the same time to commence their suits, or actions, after the disability shall be removed, now allowed by law in other cases.

"SEC. —. That this act shall not take effect, as respects deeds heretofore made, until the first day of January, 1843."

Statutes of limitation being intended to give repose to those having right, or apparent right, should be liberally construed with the view to attain the object intended.

From the title of the act, as well as from the operative words by which it prescribes a rule of action, it is evident that it is strictly an act of limitation, and that it was not intended and should not operate to give a right except so far as by limiting the time of asserting title, it creates or confirms a right in the party who is in possession. If it were not of this character simply, it would be something more than an act of limitation. But being, as it clearly is, an act of limitation only, it resembles other acts of that name and character in its object and effect of giving repose and quiet to parties in possession under an apparent right. And such acts, especially, when relating to land, are entitled to, and have generally received from this Court, a favorable regard and a liberal construction, with a view to the attainment of their objects.

The act of 1840 limiting the time for bringing suits by widows and their heirs for lands, which it has been attempted to convey by husband and wife, confined to the cases enumerated in the statute. In all other cases, the widow, or her heirs, has twenty years from the death of the husband.

The act then was intended to amend the law limiting actions by females and their heirs, which carries us back to the previous law limiting such actions. But in looking into the body of the act, we see that it does not apply to all actions by females and their heirs, but only to cases in which there has been or shall be an attempt by husband and wife to convey the title of the wife; and when, by reason of one or other of the enumerated defects, the deed has failed, or is supposed to have failed to pass the title of the wife, and on the ground of this defect she or her heirs assert title and sue for

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the land. In all of these cases, by the previous and present law, if the deed be actually inoperative as to the wife, she or her heirs have a right of entry and of action as soon as the title or power of the husband to control her land ceases. And by the previous law, limiting their actions in such cases, she and her heirs had twenty years, within which to commence their suits, from the time when this right of entry or cause of action accrued. It was obviously the purpose and only purpose of the statute to reduce the period of limitation, in all the enumerated cases, from twenty to three years, after the 1st day of January, 1843. And while it thus left an opportunity to the females or their heirs, certainly sufficient for the assertion of their right, whenever the *feme* had not, in fact, freely and willingly executed the deed, its object and intent was to hasten the period when the *bona fide* purchaser might be absolutely protected by lapse of time, against the assertion of a claim, founded solely upon technical defects, for the most part, committed by the officers of the law, but which invalidated the evidences of his purchase, and in point of law, left the title in the wife, subject only to the effect of the deed, as the sole act of the husband. And as this purpose, in its nature, applies alike to all claims and actions founded upon the enumerated defects, so we cannot doubt that the legislature intended to subserve this purpose, in the act before us, by prescribing a new and reduced limitation to all actions founded upon any of them, without discrimination as to persons or circumstances, except as it has expressly made it in favor of persons under certain disabilities defined in the proviso.

Indeed, so manifest is the purpose and intent of the act, that it would not be perceived on a cursory reading, that the effect of one its clauses, if taken literally, is to exclude from the new limitation a case, the circumstances of which constitute no possible ground for the discrimination, and the exclusion of which, as it would in that case prolong the period for litigation, and postpone the period of repose, would so far defeat the inten-

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tion of the law-makers. We refer to the language used, to describe the period, or event, from which the three years are to be counted, within which suits or actions, in the cases referred to, must be commenced by the feme or her heirs. The words are that these suits or actions shall be commenced within three years "next after such feme has or shall become discovert, or next after the death of the husband, in case he survives her." The statute describes and was, unquestionably intended to apply, in some way, to all actions by females or their heirs, founded on the enumerated defects. And as all are to be commenced within three years, the obvious inference from this fact, as well as from the identity of the mischief and of the object in every case, is, as already stated, that the same limitation, the same interval for litigation, and the same period for absolute repose, was intended to be prescribed, in every case, where a right of action should be founded on any of the enumerated defects. But upon scrutinizing the language, first quoted, it appears that, according to its literal import, three years are allowed, after the death of the husband, in every case in which he survives the wife. So that, although the power of the husband over the title and the land of the wife ceases absolutely upon her death, if there have been no child of the marriage; and although the right of entry and of action accrues to her heirs at the same moment, the new limitation would not operate upon them until the husband's death—and if he live twenty years the act would not affect them—but they are left under the old limitation—while if the right of entry and cause of action accrue to the wife by the death of her husband first, the act operates upon her, and she must sue within three years. And so, although when the husband is tenant by the curtesy and has a life estate in the land, the three years do not commence running against the heirs of the wife until the husband's death. It properly begins then, and not before, because until his death they have no immediate right or cause of action. Most assuredly the legislature did not, as seems to have been sup-

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posed in argument, intend by this act of limitations to change the marital law and give the husband a life estate in his wife's land, though there were no issue of the marriage; nor in that case to suspend the right of her heirs to sue him or his alienee for her land. The object was not to postpone, but to shorten the period of suing. And, as in the case supposed, the right of the heirs, undoubtedly, accrues at the moment of the wife's death, and they may immediately sue; the effect of the interpretation contended for, is to subject them to no certain limitation whatever, and to apply to them within the period of twenty years, which was the old limitation—a contingent limitation of three years after an event which has no effect whatever upon their title or right of action. This result, so obviously inconsistent with the general scope and tenor of the act, and certainly subversive of its general intent, cannot be attributed to any actual intention to exempt the case referred to, from the same limitation which is prescribed for other cases, since no possible motive can be suggested for such an exemption. Nor can it be imagined that the legislature intended to introduce a new principle into this act of limitation, by making the prescribed period for bringing the action depend, for its commencement, on the happening of an event, which, in the case in question, is not only immaterial to the right, but could not happen until after the cause of action had accrued, which would be to make the limitation uncertain in every particular, except in being longer than the prescribed period of three years, and necessarily commencing not when, but at some indefinite period after, the cause of action accrued.

No such anomaly was intended. Nor was it intended to depart from the uniform principle pervading this as well as all other acts of limitation, that the period of limitation commences running from the accrual of the cause of action, and not afterwards, except in cases specially excepted, on account of disability or difficulty of suing. We cannot doubt that this act was intended and supposed to be in strict conformity with

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that principle, and that the clause stating, the events from which the three years should be counted, was intended to, and believed to have specified all the events on which the cause of action would accrue; that it was intended to indicate the accrual of the cause of action by either of these events, and thus to have been equivalent to the use of that phrase, as showing the time from which the three years were allowed for bringing the actions. The enumeration, or attempted enumeration of these events, was clearly not intended to limit or define the cases to which the rule of three years should be applied, nor to exclude any which are embraced in the statute, but merely to show when the three years should begin to run. In attempting to do this by specification, instead of doing it by general terms, which would certainly embrace all cases, the wife's becoming discovert, or the husband's death, if he survives her, are the only events specified from which the three years are to run. If both of these cases refer to the husband's death, in one case before and in the other after the wife, then the death of the wife before the husband is not included among the events from which the limitation is to run; and it certainly is not unless the words "next after she has or shall become discovert," can be understood as including a termination of her coverture by her own death, as well as by that of her husband, which might be deemed a violent construction. On any other construction, the enumeration of the events from which, according to the manifest intention to be collected from the previous parts of the statute, the limitation is to run, is imperfect, and this clause has, through inadvertence, failed fully to express and carry out the intention of the law-makers. What then is to be the consequence? Is not the limitation of three years to be applied to all actions founded upon the specified defects in conveyances executed by husband and wife? And is it not to commence from the accrual of the cause of action in every case?

Suppose the statute, after specifying the actions, had merely said, they "shall be commenced in three years;"

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would the Court have hesitated to say that the three years were to commence at the accrual of the cause of action, and to give it the same effect as if these words had been in it? Or suppose it had said, "within three years from the death of the husband, or wife," would it not have been construed as if it had stopped at three years? And would not the Court have said that the three years should begin at the death of the wife before the husband, when he is not tenant by the curtesy, and at the death of the husband after the wife, when he is tenant by the curtesy? And would not the result have been the same, if the words had been "within three years from the termination of the coverture, or the death of the husband if he should survive the wife?" And if all this would not only be authorized, but required, by the certainty that the statute intends to apply the same limitation to all of the actions embraced in it, and that this identity and the very nature of a limitation to actions require that the time of limitation shall commence at the accrual of the cause of action, must we not, on the same considerations, say that three years from the death of the husband, if he survive the wife, indicate the commencement of the three years, in those cases only in which he is tenant by the curtesy? And then, as the event of the death of the wife before the husband, he not being tenant by the curtesy, would still be omitted, would we be bound to say that the mere omission to state that event as one of those from which the three years were to run, though caused by inadvertence, shall have the effect of excluding from the statute a case clearly within its letter and spirit, and of thus exempting it from the limitation of three years, which was obviously intended to apply to it?

Suits for land by a *feme covert* or her heirs for her lands which it was attempted to convey, but which was not conveyed for defects, as specified in the act of

Sooner than give such an effect to a mere omission in a clause intended not to specify the cases upon which the limitation should operate, but only the contingencies arising in those cases from which the cause of action might accrue, and the period of limitation commence, we should feel bound to reject the attempted specification of these contingencies, as being superfluous as

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1840, must be brought within 3 years after the right of action accrues, whether the husband be dead or living.

well as imperfect, or to adopt if necessary the construction that the words, "after the wife becomes discovert," refer to a termination of the coverture, whether by her death or that of her husband. But as there is enough in the statute, independently of this attempted specification, to authorize the application of the three years limitation, commencing at the accrual of the cause of action, to every action described in the act; and as the omission to specify, in the clause referred to, the contingency of the wife's dying before the husband, he not being tenant by the curtesy, cannot take out of the statute such actions as are founded on title accruing by that contingency, we are of opinion that the statute fully authorizes, and indeed requires the application to that case, of the limitation of three years, commencing at the the accrual of the title. And we restrict the words "next after the death of the husband, in case he survive the wife," to the case in which he is tenant by the curtesy, because, to apply it to the case in which he is not tenant by the curtesy, would be repugnant to the substantial provisions of the statute, and defeat its intended operation. It is true, the words of this clause, according to their literal and grammatical construction, are perspicuous enough, and free from ambiguity. But when applied to the subject matter, and compared with the context and with statutes and laws in *pari materia*, it is found that, according to their literal import, they contain a principle repugnant to the body of the statute, and to the principle of this and all other acts of limitation; we therefore restrain the full operation of the words, so as to avoid this repugnancy. And seeing clearly that this clause was intended to specify all the contingencies on which the right of action depends, in the cases described in the preceding part of the act, and that it was intended to subject all the actions to the same limitation of three years from the accrual of the cause of action, we construe the clause as if it read, "within three years," or "within three years after the accrual of their title or cause of action," or "within three years after the wife has or shall become discovert, or after her

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death if the husband survive and be not tenant by the curtesy, or after his death if he survive and be tenant by the curtesy," or "within three years after the termination of the coverture by the death of the husband, or by the death of the wife if he be not tenant by the curtesy, or three years after his death if he survive her and be tenant by the curtesy." All of these readings have precisely the same meaning, and correspond precisely with the object and spirit and letter of the statute, unless a disagreement be found in the specifications under consideration; and those specific ations, if repugnant, should be disregarded, or though not repugnant, being superfluous and evidently imperfect, should not control, but must yield to, and be moulded to a conformity with, the more substantial and explicit provisions of the act.

The Court have no power to make law, but it is their duty so to expound statutes as to give effect to the obvious intent of the Legislature; in doing which the Court should have respect to the context, subject matter, cause of the enactment, and consequences which follow the construction; and not be confined to the letter. (4 *Litt.* 377.)

It is said, that to construe a statute as if certain words which it contains were not in it, and as if it did contain other words which are not in it, is transcending the judicial function, and assuming that of the legislature. But while it is admitted that the Court has no power to make the law, it is equally true, that it is their province and duty so to expound the statutes as to ascertain and effectuate the will of the law makers. And experience has shown that if every word or clause of every statute were to have its literal force and effect, without regard to the context and spirit of the whole or to the subject matter, or the causes or consequences of the enactment and of the construction, some statutes might be found wholly incapable of enforcement, while others might, in their operation, defeat or fall entirely short of their manifest object. Upon this subject we quote from the opinion of this Court, in the case of *Mason* vs *Rogers*, (4 *Littell*, 377,) the following passage not less truly than forcibly expressed. The Court then said, "The literal interpretation of an act is certainly not, in all cases, the interpretation which either reason or law requires to be given to it; for it is not the words of the act, but the will of the Legislature which constitutes the law, and though words are the most common, they are not

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the only signs of the legislative will. The context, the subject matter, the effects and consequences, and the reason and spirit of the law, are often called in to aid in ascertaining the intention of the Legislature. No language is, indeed, so perfect as to afford words to express every idea upon all subjects, and even when words are not wanting those that are most happily adapted to the purpose in view, do not always occur to the minds of the Legislature. Hence it is that words are employed which sometimes go beyond the legislative will, and sometimes fall short of it, which sometimes are too general and comprehensive, and sometimes too particular and restricted. And it is, therefore, an established rule of construction, applicable to all remediable statutes, that cases within the reason and not within the letter of a statute, shall be embraced by its provisions, and cases not within the reason though within the letter, shall not be taken to be within the statute." These principles are fully sustained by authority, and although they may not give so wide a scope in the exposition of statutes of limitation as of some others, still the main object of ascertaining and effectuating the legislative will is the same with respect to all. And if we may not go so far out of a statute of limitations for ascertaining that will as if it were more strictly remedial; yet if the legislative will be found plainly exhibited in the statute itself, it must be equally within the province of the Judge so to construe its different parts as if possible to make them harmonize, and by supplying manifest deficiencies or rejecting minor repugnances and superfluities by which the evident object of the act might be defeated, to make the whole co-operate in carrying out the will of the Legislature. And it would seem to be a perversion of the judicial power of expounding and enforcing the legislative will, to allow that will, when clearly manifested by the substantial provisions of an act, to be defeated or materially obstructed by the literal interpretation of a subordinate clause which might have been wholly omitted.

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The disabilities which save the right of action to the heirs of a married woman who has attempted to convey her lands, as specified in the act of 1840, are to be the same as would save the right of action under the statute of limitations of 1796 and 1814; all must be under disability.

With regard to the proviso, in this statute, we need only say that, in describing the persons whose disabilities may postpone the commencement of the limitation, it describes them collectively as heirs of the *feme*, and being, therefore, analagous to the saving clause in the general statute of limitations of 1796, we give to it the same construction which that clause has received, as requiring all the persons entitled as heirs to be under disabilty. And, we suppose, that as the right of action in the cases specified in the act before us, would, if that act had not passed, have been subject to the general limitation act of 1796, so the time allowed to persons under disability by that act, as modified by the act of 1814, is the law referred to in this proviso, for determining the extent of their privilege after the disabilities are removed.

As, upon our view of the act of 1840, the bar of three years applies to the present action, as having been brought more than three years after the death of Mrs. Pope, though within three years after the death of her husband, we only remark with reference to the authentication of the deed to Gaither, that the certificate of acknowledgment is substantially the same, as has heretofore been deemed insufficient by this Court. And, although, as no statute has prescribed the form in which the Clerk shall certify the acknowledgment and privy examination of a *feme*, we should be disposed to allow considerable weight to the form or usage adopted commonly by Clerks, when the power of taking the acknowledgment was conferred on them, if it had been shown to have been a common usage to certify, substantially, as they had done, when the deed was acknowledged before the Court, yet we have not had such evidence of any general practice on the subject as would authorize a change of opinion with regard to the facts necessary to be shown in the certificate. And we are still of opinion that the Clerk being a ministerial and not a judicial officer in taking the acknowledgment and admitting the deed to record, his certificate should show the material facts on which he has acted.

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But upon the other question stated and decided, the judgment in favor of the plaintiff being erroneous, is reversed and the cause is remanded for a new trial.

J. & W. L. Harlan, C. A. Wickliffe, B. Hardin and Haskin for plaintiff; *Bradley* for defendants.

Ford, &c. *vs* Gregory's Heirs.

EJECTMENT.

APPEAL FROM THE HENRY CIRCUIT.

Case 52.

Conveyances. Femes covert. New trial.

JUDGE SIMPSON delivered the opinion of the Court.

January 16.

Case stated.

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THIS action of ejectment having been decided, on the first trial in the Circuit Court, in favor of the present appellants, who were the defendants in that Court, the judgment of the Circuit Court was reversed, and the cause remanded for a new trial. The opinion of this Court reversing the judgment, is reported in 5 *B. Monroe*, 471, and contains a statement of the matters involved in this controversy.

Upon the return of the cause to the Circuit Court, a trial was had, and a verdict was again obtained by the defendants. The Court, upon the plaintiff's motion, granted them a new trial, and upon the next trial the plaintiffs recovered a judgment for all the land in contest, except that contained in the deed for eighty-four acres. From this last judgment the defendants have appealed, and the plaintiffs have assigned cross-errors, calling in question the validity of the deed from Gregory and wife to Mitchell for the eighty-four acres.

The right of the appellant to a reversal of the judgment, depends mainly upon the legality of the authentication of the deed from Gregory and wife to Mitchell for the two hundred and fifty-two acres. The deed, as stated in the former opinion, is dated in 1808. In 1815 it was acknowledged by Mrs. Gregory before the Clerk of the Nelson County Court, in which county Gregory resided, and upon a certificate by said Clerk

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of her acknowledgment endorsed on the deed, and proof by two attesting witnesses before the Clerk of the Shelby County Court, in which latter county the land is situated, of the execution of the deed by Gregory, it was admitted to record in the office of the Shelby County Court. Evidence was introduced upon the trial conducing to prove a delivery of the deed by both Gregory and wife in 1815, at the time it was acknowledged by the wife before the Clerk of the Nelson County Court, but this evidence was excluded by the Court upon the motion of the plaintiffs.

In the former opinion, it was held, that although a deed cannot take effect by every delivery, and if it take effect by the first delivery, a second delivery is void; yet as this deed did not take effect according to its intent and purpose in 1808, there having been no valid delivery, by the wife at that time, that it might be perfected by the subsequent delivery of both husband and wife, and that if recorded, with the proper certificates, within due time after such subsequent delivery, it would be effectual to pass the title and interest of both, according to its tenor. The exclusion of the testimony introduced to prove a delivery of the deed, by both husband and wife in 1815, was, therefore, improper, unless the certificate of the Clerk of the Nelson County Court was insufficient to authorize the deed to be recorded in the county of Shelby. It is contended that the certificate is void, because the Clerk in Nelson was not authorized, by law, to take the acknowledgment of the wife, as he did not receive the acknowledgment or proof the execution of the deed by the husband.

The statute of 1810 (2 *Stat. Law* 447) deeds may be acknowledged or proved before any County Court Clerk, and upon being duly certified may be recorded in any county where the land lies, and the

By the act of 1810, (1 *Stat. Law*, 447,) deeds may be acknowledged or proved in the office of any County Court, before the Clerk thereof, and being duly certified, are authorized to be placed upon record in the office of the County Court of the county in which the land lieth; and the Clerk receiving the acknowledgment or proof of the deed, as the case may be, is empowered to take the acknowledgment of the wife, on privy examination of the person making the deed, and that be-

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ing duly certified with the deed and recorded, transfers her estate or dower in the land, as fully as if the examination had been made by the Clerk in whose office the deed shall be recorded.

Clerk receiving the acknowledgment or proof may receive the acknowledgment of the wife or privy examination, which being duly certified will pass her title.

The object of this statute was to enable other County Court Clerks, besides the one in which the land lieth, to take the acknowledgment of deeds. As the law was understood, at the time of its passage, deeds could be proved or acknowledged before no other Clerk but the Clerk of the County Court of the county in which the land was situated. But that Clerk was authorized to receive proof of the execution of the deed by the husband, and in such a case to take the acknowledgment of the wife on privy examination, or to take the acknowledgment of both husband and wife.

By a fair construction of the statute of 1810, a Clerk of any County Court may take the relinquishment of a *feme covert* on privy examination, though he shall not take the acknowledgment or proof of its execution by the husband.

The Legislature, intended by the statute, to produce a salutary change in the law, that would remove some of the inconveniences under which the grantors in deeds labored in having them legally authenticated, and that would furnish additional facilities to the execution of deeds by married women. To accomplish this object, a liberal construction should be given to the statute—one that tends to promote and not to defeat this legislative intention. The statute authorizes the Clerk of any County Court to take the acknowledgment, or receive the proof, of the execution of the deed by the husband, and also to take the acknowledgment of the wife. This provision, however, should not be construed, as making the power of the Clerk to take the acknowledgment of the wife, depend upon his receiving the acknowledgment or proof of the execution of the deed by the husband, but as indicating the officer who might take the acknowledgment of the wife to a deed executed by her and her husband, and prescribing the mode in which it is to be done to render the transfer of her estate effectual, and specifying one of the cases to which the provision would apply. The only pre-requisite, contemplated by the statute, is the execution of the deed by the husband, and not its acknowledgment or proof of its execution by the husband be-

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fore the same Clerk. There does not seem to be any satisfactory reason, why the acknowledgment of the wife, before a Clerk of a different county than that in which the land lies, properly certified, should not be valid when the deed shall have been duly executed by the husband, and recorded with the certificate thereon, according to law, upon its acknowledgment or proof of its execution by him, either before the same Clerk or the Clerk of the County in whose office the deed is required to be recorded. Either of the Clerks have, according to any construction of the statute, power to take the full acknowledgment of the deed by both husband and wife. The power to do all, necessarily implies the power to do each and every part. The Clerk, whose duty it is to record the deed, may take the acknowledgment of the wife, although the execution of the deed, by the husband, be only proved before him by witnesses, or his acknowledgment be certified by another Clerk. The County Court Clerks are, in this respect, all placed by the statute on the same footing, and those in other counties have the same power to take the acknowledgment of deeds, as well those executed by *femes covert*, as all others that the Clerk has, in whose office the deeds have to be recorded.

It would be difficult to suggest any reason for requiring the acknowledgment of the deed by both husband and wife, to be made before the same tribunal or the same Clerk, unless it be to satisfy the officer taking the acknowledgment of the wife, that the deed is made with the consent and co-operation of the husband. But as the statutes upon this subject, prior to the statute of 1848, seem to contemplate and give effect to a joint deed only, the execution of a deed by the husband, purporting to be the deed of himself and his wife, must be regarded as sufficient evidence of his concurrence in the act of his wife. And as the joint deed cannot be admitted to record unless its execution by the husband be proved or acknowledged, and as the acknowledgment of the wife is ineffectual, and does not operate to divest her of her estate, unless the deed be duly record-

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ed, this reason would not seem to make it necessary that the deed should be acknowledged by both husband and wife before the same officer. The object of the law in requiring a separate and privy examination of the wife, will evidently be more fully and certainly attained, by her acknowledgment having been made before one officer, and that of her husband before a different one, than if the deed should be acknowledged by both of them at the same time before the same tribunal. Indeed the true spirit of the law, would seem to be more fully complied with, where the deed is acknowledged by the husband at one time, and by the wife at another, even when done before the same officer, than where the acknowledgment is made by both at the same time.

We are disposed to give a liberal construction to this, and other statutes upon the same subject, having in the exposition which we give, a greater regard to the real object and design, than to the strict letter of the law, with a view to sustain rather than destroy titles derived from *femes covert*. These laws have been enacted by the Legislature from time to time, for the convenience of the citizen, and to give increased facilities to the transfer of real estate, and should not be fettered in their operation by a restricted and literal construction, tending to subvert, rather than to advance this object. The act of 1810 was obviously intended to be a remedial statute, to enable the grantors in a deed, to acknowledge its execution in any county in the State, and to dispense with the necessity of having it recorded in any other county than that in which the land lies. It expressly authorizes a Clerk to take the acknowledgment of the wife, in cases where he receives proof of the execution of the deed by the husband. In such cases it is perfectly evident, the acknowledgment of the wife, made even when her husband is absent in another county, is legal and valid. As proof of the execution of the deed by the husband is all that is necessary to impart validity to the acknowledgment made by the wife, there seems to be no imaginable

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reason why this effect should not be produced by proof of this fact, before the clerk where the deed has to be recorded. We are therefore of the opinion, that the acknowledgment of the deed by Mrs. Gregory before the Clerk of the Nelson County Court, and the proof of its execution by her husband before the Clerk of the Shelby County Court, authorized it to be admitted to record.

But it is contended, that nothing short of official record evidence is sufficient to prove a delivery of the deed in 1815, inasmuch as it bears date in 1808; and as neither the Clerk of Nelson, in certifying the acknowledgment by the wife, or the Clerk of Shelby, in certifying the proof of its execution by the husband, stated that a delivery of the deed had been made by the grantors at that time, that the authentication is not legal, and that the parol testimony which was offered and excluded, was insufficient to make the conveyance operate as a valid transfer by Mrs. Gregory.

Deeds are presumed to have been delivered at their date; but a delivery at a subsequent day may be proved. A valid delivery must precede an acknowledgment (6 *Litt.* 465: 7 *J. J. M.* 120) & acknowledgment is *prima facie* evidence of delivery on the day of the date—tho' other evidence may be adduced to show the actual time of delivery.

The delivery of a deed is always presumed to have been made on the day of its date, and its subsequent acknowledgment does not change this presumption, but the delivery may be proved to have occurred at a different time. As, however, a delivery is necessary to the validity and complete execution of a deed, it must have been made before the deed can be acknowledged: *McConnell* vs *Brown*, (6 *Litt.* 465,) *and Speed* vs *Brooks*, (7 *J. J. Marshall*, 120.) But the law does not require the Clerk to ascertain or to certify the time of the delivery, and as the acknowledgment is only evidence of an antecedent delivery, and the date of the deed is only *prima facie* evidence of the time, other evidence is admissible to prove the time when the delivery was actually made.

The statute requires deeds to be recorded within a prescribed time *after delivery*, not *after date*.

The statutes do not require a deed to be recorded, or lodged for record, within a prescribed time after its date, but after its delivery. If, then, the deed under consideration was delivered by the grantors in 1815, and duly acknowledged, or proved, and recorded, it is effectual to transfer the title of Mrs. Gregory; and parol evidence is admissible to prove the time of its delivery.

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The objection made to the testimony upon the ground that the evidence of the attesting witnesses is the only legal testimony on this point, cannot be sustained, because it was proved that the attesting witnesses were dead. The question as to the admissibility of parol evidence to prove the time of delivery, was virtually decided when the case was formerly before this Court, and the opinion the Court then delivered, is in accordance with the views now expressed, and with what we believe to be the true doctrine on the subject.

Whether the deed was delivered by Gregory and wife in 1815, was a question of fact to be tried by the jury. The Court, therefore, erred upon the last trial, in excluding the evidence upon this point, and the judgment will have to be reversed. But it is contended by the plaintiffs in error, that instead of awarding a new trial, this Court should direct the Circuit Court to render a judgment on the first verdict upon the ground that it improperly granted a new trial, on the motion of the plaintiffs in the Court below.

On the first trial a witness testified that Mrs. Gregory died in the lifetime of her husband, and that her husband had died about eight or nine years previous to the time of the trial. The husband having been tenant by the curtesy, the plaintiff's right of action did not accrue until his death, and it was, therefore, incumbent on the plaintiff to prove that his death had occurred prior to the date of the demise, which was more than eight, but less than nine years, previous to that time. The testimony of the witness as to the time of Gregory's death, being uncertain and indefinite, the verdict of the jury, for this cause, was rendered for the defendants. One of the lessors of the plaintiff, filed an affidavit, stating that he, as the agent of the other lessors, had been the sole manager of the suit on the part of the plaintiff; that the witness who testified on the trial, in reference to the time of Gregory's death, had informed him, previously, that he knew and would testify that Gregory had died in October 1838, before the date of the demise in plaintiff's declaration, and that

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he had gone into the trial, believing the witness would prove the fact to be so. He also stated in the affidavit he could prove by Alfred Swope that Gregory died in October 1838, that the witness who testified on the trial, resided in Nelson County, and had gone home before the jury brought in their verdict, so that he had not obtained his affidavit, but if deemed necessary and required by the Court, he would procure it.

The affidavit of A. Swope was not filed, but his evidence on this point upon the last trial, is contained in the bill of exceptions. He proves the death of Gregory to have occurred in October 1838, before the date of the demise.

The principles the Court of Appeals in revising the judgments of the Circuit Court in overruling motions for new trials are more rigorous, and require the grounds to be more fully made out, to justify a reversal than those which apply to cases where a new trial has been granted.

The first verdict was given obviously without a trial of the merits of the case. The probabilities all went to establish the death of Gregory before the date of the demise. The testimony of the witness on this point, would have been sufficient to have sustained a verdict for the plaintiffs. The certainty of the fact was made apparent on the subsequent trial. The affidavit filed upon which the new trial was granted, taken in connection with the evidence that had been given upon the trial, could leave no reasonable doubt that the death of Gregory had occurred before the date of the demise. It being evident that the cause had not been fully and fairly tried upon its merits, a new trial ought to have been awarded. The principles which govern in revising the judgment of the Court below, overruling a motion for a new trial, are more rigorous, and require the grounds, in favor of a new trial, to be more fully made out and sustained, to justify a reversal of the judgment, than those which apply to cases where a new trial has been granted. In the last mentioned cases, the action of the Court upon the subject, will not be disturbed, although the rules of law applicable to granting new trials, have been, in some degree, relaxed, if it be apparent, as it was in this case, that the new trial was necessary for a determination of the justice of the cause upon its merits.

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A deed once passed upon by the Court of Appeals, and held to be valid, cannot be again questioned, tho' the case be again before the Court of Appeals—*argu.*

It is contended upon the cross-errors assigned, that the Circuit Court erred in deciding that the deed for eighty-four acres was valid, and transferred to the vendee the title of the wife. In the former opinion of the Court, delivered in this case, the authentication of this deed, upon the objections then made to it, was considered sufficient; and it having been decided, upon the trial in the Circuit Court, that the title of the wife passed by it to the purchaser; that decision was held to have been correct. The deed is now presented in exactly the same condition it then was. Can its validity be again called in question, and other objections made to its authentication that were not then urged? We are decidedly of the opinion that this cannot be done. It is a matter adjudicated upon, and no longer open for inquiry between these parties. Suppose the eighty-four acres, contained in this deed, had been alone in contest, and the Circuit Court had decided, as it did, that the deed was valid, and the judgment of the Circuit Court had been affirmed by this Court, as would have been done, would not the point have been conclusively settled between the parties? Should not the same effect be given to the decision in the form it was made? Or suppose the deed to have been held to be insufficient in the Circuit Court, and the judgment of that Court had been reversed upon the ground that it had erroneously decided that point, could the question of the legality of the authentication of the deed, after a trial and decision in the Circuit Court, in conformity with the opinion of this Court, be again raised and discussed? Clearly not; nor does the fact, that other matters were involved in the controversy, which had to be tried by the jury, alter in any degree the legal and conclusive effect of the decision in reference to the sufficiency of the authentication of the deed, which depended on what appeared on the deed itself, and had to be determined by the Court and not by the jury.

But the objection now urged to the authentication of the deed for eighty-four acres, is the same that was made to the deed for two hundred and fifty acres, that

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we have already considered. Both deeds were acknowledged by the wife before the Clerk of Nelson county, and their execution, by the husband, proved before the Clerk of Shelby county. As this objection applied to both deeds, and as the deed for eighty-four acres, was, in the former opinion, determined to be so authenticated as to transfer the estate of the wife in the land, it was virtually overruled on that occasion. But as this objection to the authentication of the deed, cannot be sustained according to the construction given to the statute of 1810, in this opinion, it is not material whether the parties are to be regarded, as concluded by the former opinion or not.

Wherefore, the judgment is reversed, and cause remanded for a new trial, in conformity with the principles of this opinion.

Craddock and McHenry for appellants; *Robertson and B. & A. Monroe* for appellees.

CHANCERY.

Case 53.

Russell *vs* Petree, &c.

ERROR TO THE TODD CIRCUIT.

Equities. Liens. Notice.

January 18. JUDGE SIMPSON delivered the opinion of the Court.

The case stated. WILLIAM POWERS was the purchaser of two lots in the town of Elkton, in Todd county, for the title to which he held the separate bonds of the two individuals from whom he had purchased the property. These bonds he placed in the hands of Russell, the plaintiff in error, for the purpose of securing to him the payment of the price of some improvements, which, by contract between the parties, he was to make upon the lots.

At a subsequent period, Russell became the security of Powers in a replevin bond, in favor of F. M. Bristow, and also agreed to be responsible for a debt due to A. Thompson, upon the express understanding and agreement, however, between him and Powers, that he was to retain the bonds for the two lots, to indemnify him

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as surety in the replevin bond to Bristow, and also to secure the payment of the debt to Thompson.

After these arrangements had been made, Powers mortgaged the two lots to Roberts and Newton, to secure the payment of a debt which he owed to them. This debt having been assigned to Hazel Petree by the mortgagees, he brought a suit to foreclose the mortgage, and Russell having been made a defendant, he asserted a lien on the two lots for the balance due him on account of the improvements he had made upon the lots, and for the amount of the debt to Bristow, which he alleged he had paid for Powers as his surety, and also for the debt due to Thompson. Russell had, after the commencement of the suit, but before he filed his answer, which he made a cross-bill, obtained from Powers a written assignment of the two bonds, which he exhibited and relied upon.

Did the verbal agreement between Powers and Russell, and the deposit of the title bonds for the lots, and the subsequent assignment of them to Russell, vest in him any available claim or right to the property? This is the principle question in the case.

We do not deem it necessary to determine, at present, whether the deposit of the title bonds, under a mere verbal arrangement would, of itself, have vested Russell with any enforcible equity. A title bond for land is assignable under our statute. The assignment vests in the assignee the legal title to the bond. The mortgage by Powers did not operate as a transfer of the title to the bonds, but only conveyed to the mortgagees an equitable title to the lots. The legal title to the bonds still continued in Powers, notwithstanding the verbal sale of them to Russell, as a security, and the execution of the mortgage upon the lots. A suit, at law, upon the bonds, could only have been maintained in the name of Powers. When, therefore, he assigned the bonds to Russell, the legal title to them passed to the assignee. The assignee has the exclusive right to sue, at law, upon the bonds, and also an enforcible equity to the land, unless the equity of the mortgagees is superior to his.

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RUSSELL vs PETREE &c.

As between equities priority gives preference. A prior equity with a legal advantage will not be disturbed, in favor of a junior equity, though the legal right was acquired in aid of the prior equity after a knowledge of the junior equity of the adverse party.

Russell acquired, by the possession of the bonds and the verbal contract with Powers, an equity, which, whether enforcible or not, prior to the assignment, he can rely upon, after the assignment, for protection against the mere equity of the mortgagees. His equity is prior, in time, to that of the mortgagees, and having by the acquisition of the title to the bonds, obtained a legal advantage, a Court of Equity will not deprive him of it, in favor of an equity which originated subsequent to, and is not more meritorious than his. The fact that he had knowledge of the equity of the mortgagees, at the time of the assignment, cannot prejudice his prior equity. If the only right which he has, had been acquired by the assignment, as he received that with notice of the equity of the mortgagees, he would be compelled to surrender it to their claim. But having, in reference to time, the superior equity, and also the legal title to the bonds, his attitude protects him to the extent of his claim, unless his equity was unknown to the mortgagees when the mortgage was executed, in which event, as the law requires a mortgage on equitable titles to be recorded, which was done in this case, it may be a serious question, whether his equity, being secret must not yield to the recorded equitable right of the mortgagees.

Information which should put a party upon inquiry is sufficient notice.

It is admitted, by the answer, the mortgagees had notice, at the time the mortgage was executed, that the bonds for the lots were in the possession of Russell, having been previously deposited in his hands by the mortgagor, as a security for certain purposes. It is alleged, however, that the mortgagor informed them at the same time, that although Russell held the bonds in his possession, he had no further lien upon them or the property, his claim having been previously discharged in full. The information they had, apprizing them of the fact that the bonds for the lots were in the possession of Russell, was sufficient to put them upon an enquiry into the nature and extent of his claim. If they relied upon the statements of the mortgagor, they done so at their peril. It was their duty to have ascertained

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from Russell, himself, whether he had any claim upon the property. If they failed to do it, the law deems it their own fault, and considers them constructively notified of his equitable rights to their full extent. The mortgage was executed to secure a pre-existing debt, and it may be presumed that the mortgagees were willing to accept it, as it seems to have embraced all the property belonging to the mortgagor, without instituting any enquiry into the nature and extent of Russell's claim upon the lots, determining to risk the validity of that claim, knowing that their condition could not be bettered by any additional knowledge they might acquire on the subject.

If the testimony of Powers, it having been assailed, be entirely excluded from consideration in determining the extent of Russell's lien, still, the other evidence is entirely sufficient to sustain it, not only for the sum decreed to him by the Court below for the balance due to him on account of the improvements which he made upon the lots, but also for the debt, which, as the surety of Powers, he paid to Bristow. Nor can we perceive any satisfactory reason why the lien should not embrace the debt to Thompson. The arrangement, in relation to the debt, does not depend upon the testimony of Powers alone, but is fully established by the testimony of Anderson. Thompson accepted Power's note, payable directly to himself, in discharge of a debt he held on Anderson. He was induced to do it, by the promise made by Powers at the time, that Russell should retain the bonds for the lots until the debt was paid, and the promise of Russell consequent thereon, that the debt should be paid. The transaction creates a clear equity in favor of Thompson, who agreed to, and did change his debtor, upon the faith of having a lien upon the lots in the hands of Russell for the payment of the debt.

We are, therefore, of opinion a decree should have been rendered securing to Russell a priority of lien upon the lots, not only for the balance due him for the

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BLACK vs CARTMELL &c.

improvements, and the debt be paid to Bristow, but also for the balance due upon the debt to Thompson.

Wherefore, the decree is reversed and cause remanded, that a decree may be rendered in conformity with this opinion.

J. & W. L. Harlan for plaintiff; *Bristow and Petree* for defendants.

CHANCERY.

Case 54.

Black *vs* Cartmell, &c.

ERROR TO THE NELSON CIRCUIT.

Wills. Devises. Heirs. Lawful issue.

January 19.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

JACOB CARTMELL, by his last will, made on the 15th April, 1833, devised different portions of his estate to each of his four children, giving to his daughter Catherine Higdon 200 acres of land and four slaves, then in possession of William Higdon, her husband. By the last clause of the will, the estate intended for Mrs. Higdon, is vested in trustees for the benefit of said William and Catherine during their joint lives, or continuance in wedlock, free and exempt from any debts or liabilities of the husband, &c., giving them both the right to use and enjoy the property, or receive the rents, &c.; and provides as follows: "If the said Catherine dies, without issue, before the said William, [all] of the the estate, hereby devised, is to be equally divided among my heirs; but if she survives the said Higdon, the trustees are to release the estate to her; and in that event, the estate devised to her, is to be vested in her to do with and dispose of the same as she may think proper."

By a codicil made on the 26th May, 1333, the testator reciting that by his will he had devised sundry estate to his daughter Catherine Higdon, that is, for her benefit and that of her husband during their joint lives, devises the same estate to trustees for the exclusive use and

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benefit of his daughter Catherine Higdon, during her natural life; and if she die without lawful issue of her body, then the said estate is to pass and vest, by this will, in my (the testator's) lawful heirs. It is then expressly provided that the trustees shall manage the estate for her exclusive benefit; that the said William Higdon is not to have, use, or occupy any portion of it, nor to live on the land but at their discretion; and they are not to permit him to sell, rent, or hire the same for any purpose or term. He is, in no event, to have control or management of the same, but the same is to remain in the trustees, free from his debts, or liabilities, or use; and after the death of my daughter, if she die *with* [without] lawful issue, the same is to be sold and equally divided between my three children, N. H. Cartmell, Sarah Lane, and Eliza Nelson, and the heirs of such as may be dead.

Decree of the inferior Court.

Catherine Higdon survived her husband, and after his death had an illegitimate son, Moses Black, her only issue, who, in this suit, for partition, &c., between the three devisees, in remainder, claims the estate devised to his mother, all of which had been in his possession after the death of the testator. The Circuit Court being of opinion that he did not answer the description of 'lawful issue,' denied his claim, and decreed a partition among the devisees in remainder. The correctness of this opinion and decree is the only question now to be considered. And this question depends upon the proper construction and legal effect of the will.

The words 'with issue,' in the last clause of the codicil, were obviously written by mistake, instead of the words 'without issue;' and the codicil must be understood as providing for the case of Mrs. Higdon's dying without lawful issue, and not for the case of her leaving issue. But the devise over, in case of her dying without lawful issue, implies, certainly and necessarily, that such issue was to take at her death; and the only question is, whether by force of the word *lawful*, as applied to *issue*, the illegitimate son is to be excluded.

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Upon comparing the provision for Mrs. Higdon in the body of the will with that made by the codicil, it is, we think, entirely obvious that the main object of the codicil was to correct the previous provision, so far as it gave to William Higdon, the husband, an interest in the estate devised for the benefit of his wife. It was, probably, ascertained that the estate, though declared to be exempt from his debts, might, in truth, have been made subject to them; and hence the necessity of the codicil, which, in the most express and formal manner, excludes him from all use and control, and confines the use, exclusively, to the benefit of the wife. It was to make a more formal and effectual provision on this subject, that the codicil was written and executed, and not with any view of defining the sort of issue which should take the estate on the death of Catherine Higdon, or of excluding any issue which she might have. And although the word lawful, which had been omitted in the original devise, is introduced into the codicil as qualifying the word heirs (of the testator,) and the word issue (of the devisee Catherine); yet, as it is certain, that it has not the slightest effect upon the import of the word heirs, but leaves it to import, as it would have done standing alone, the persons entitled by law to inherit the father's estate; so if instead of the word *issue*, used in reference to the daughter, the words "heirs of her body" had been used, we might have felt fully authorized to conclude that the word lawful, prefixed to "heirs of the body," was entitled to no effect whatever, but left these latter words to operate according to their legal and technical import, as indicating such of her issue as were entitled by law to inherit her estate. And as her illegitimate son, being under our law her heir, would, in this sense, be the lawful heir of her body, we should scarcely hesitate to decide that the contingency of the mother dying without lawful heir of her body had not happened, and that the son coming under that description, was, notwithstanding the illegitimacy of his birth, entitled to all the benefit which would have accrued to a legitimate son, either as

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devisee under the will, or as heir to his mother, if she had taken an estate of inheritance.

Such a construction would, of course, not be given, if it appeared, or should be inferred, that the word lawful was used not as a merely formal or common prefix to the word heirs, but with a special view to indicate legitimacy of birth, as a requisite qualification of the heir or devisee referred to. But there is not the slightest ground, either in or out of the will, so far as appears by this record, for supposing that the father anticipated that his daughter, then a married woman, might have an illegitimate child, or that he intended to provide against it. Nor can it be assumed, or even presumed, that if she had had an illegitimate son when the will was made, her father would, on account of her fault, have excluded his unoffending grandchild from all participation in his estate, and left him a vagabond dependent upon the charity of others for sustenance and education. The introduction of the word 'lawful' into the the codicil, was, as we infer, the mere act of the draftsman who intended to make the codicil more formal than the original provision, for which it was to be a substitute, and therefore implies no special view to legitimacy of birth. And as the main object of the codicil was to correct the original provision, with respect to the interest thereby given to the husband of Catherine Higdon, which might defeat the benefit intended for her, it may be inferred, that the attention both of the testator and of the draftsman who probably suggested the necessity of this correction, was chiefly directed to such a remodeling of the provision as would secure the estate to the use of the wife, free from the debts of the husband; and that the omission to provide, as in the original clause, for a conveyance of the estate to the testator's daughter, in case she should survive her husband, resulted from mere inadvertance, and from overlooking the effect which, in that event, the codicil might have upon her interest. For not only was the codicil made but a few weeks after the original will, and when, so far as appears, nothing had occurred

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to change the benevolent feelings of the father towards this daughter; but, as upon comparing the two clauses, we perceive that by the first, it was only upon the contingency of Catherine Higdon dying without issue, before her husband, that the estate is devised over to the testator's other heirs, it may be supposed that, in hastily writing the codicil for the purpose of annulling the husband's interest and securing that of the wife, the same contingency was alone in view, and was intended, though not fully described. And as if it had been fully described, and no other had been provided for, the codicil might rationally have been considered as applying to that contingency alone; and as thus leaving the original clause to operate in the other contingency, therein referred to, the draftsman and the testator considering the codicil as applying alone to the contingency on which the estate was devised over by the original clause, may also have considered the original clause as still operating in the other contingency.

Under these views, entertained after the first argument of this case, except that we had not minutely compared the original clause with the codicil, further than to draw the conclusion that the object of the codicil was mainly to correct the original provision, so far as it gave an interest to William Higdon, the husband, we decided the case on the assumption that the words "lawful issue," should be understood merely as designating such issue as might, by law, inherit from the mother. And, being under this view of opinion, that whether the will should be construed, as intending the issue of Catherine Higdon to take by descent, from her, (which could only be by supposing the inheritance to be in her,) or to take, as *personæ designatæ*, that is, as purchasers or devisees under the will, her illegitimate son would, in either case, be capable of taking, as heir by descent or as heir designated; and that, therefore, the contingency on which the devise over was to take effect had not occurred, the decree excluding him from the division was on this ground reversed.

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But as the position that illegitimate issue might fill the description of lawful issue was, apparently, inconsistent in itself, and certainly inconsistent with the tenor of the British authorities, a re-argument was granted, and we have since considered more maturely, not only the position above stated, but also the will and codicil out of which the question grows.

The term 'lawful issue' not in all respects tantamount to 'lawful heirs of the body.'

With regard to the position on which the former decision was based, we cannot admit that the British authorities, founded upon laws which declare a bastard to be *filius nullius* and wholly incapable of inheriting even from his mother, and therefore not coming within the description of "heir of her body," are fully applicable to him under our laws, which giving full effect to the fact that he is certainly the son of his mother, makes him her heir, and thus brings him within the description of "heir, or lawful heir of her body." For both of these terms have precisely the same meaning; both meaning such issue as may inherit from her, which under the English law excludes, but under ours includes bastards. But upon further consideration, we are inclined to think the position referred to was erroneous in regarding the terms "lawful issue" as in all respects equivalent to the the terms "lawful heirs of her body." The word heir or heirs, is wholly technical, meaning the person or persons who may by law inherit. The words "heirs of the body," are equally technical, meaning such of the issue or offspring as may by law inherit. And it is only by a liberal and indulgent construction, indicated by the context or by circumstances, that either of these expressions is held to mean children or grandchildren. The word issue is not wholly technical, but has a natural signification and common use, including all the offspring or descendants of the person, whether heirs or not. It is therefore not identical with "heirs of the body." But although it always includes them, it is not confined to them. In its natural and common use, it means descendants or offspring—and as the phrase "lawful descendants or offspring," would clearly exclude illegiti-

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mate, or unlawful descendants, or offspring, although they might inherit; so, although the word issue is often used and understood as equivalent to "heirs of the body," still, as it has also a natural signification and common use, precisely equivalent to descendants or offspring, the fact that an illegitimate child may inherit from its mother, seems hardly to be a sufficient ground for saying that he is embraced in the words "lawful issue," as he certainly would not be in the words "lawful descendants."

Illegitimate children may inherit from the mother, but are not such 'lawful issue' of the mother as will take a remainder in an estate given to her for life, then to her 'lawful issue.'

Moses Black, therefore, cannot take any part of this estate, except as heir to his mother; and he cannot take as her heir, unless she had, under the will, an estate of inheritance. Whether as the estate, if given to her for life, is devised over upon the contingency of her dying without issue, it might not, upon the evident implication that her issue, if she should have any, should take it it on her death, be enlarged by construction or implication into an estate tail, converted by our statute into an absolute fee simple, might be a serious question if it were not that her interest, as expressed in the codcil, is equitable only, while the interest of the issue would be legal; and as the two estates being of different quality or nature, would not coalesce, therefore, the rule in Shelly's case would not apply. Nor are we prepared to decide, even if this were not so, that the estate, given expressly in trust for the mother for life, should be enlarged by implication even into an equitable fee, since the effect would be to give to herself and husband an absolute power of disposition inconsistent with the general object of such a limitation. But we are of opinion, that the contingency is limited by the terms and nature of the provision to the time of Catharine Higdon's death, and that in this view the devise over is valid.

A devise to trustees for the use of A, a *feme covert*, for life, & then to her lawful issue, gives

Then, although there might possibly be such a construction of the codicil, in accordance with the conjectural view, already stated, as would limit its operation to the contingency of the devisee, Catharine Higdon, dying without issue, in the lifetime of her husband, and

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thus leave the previous clause to operate in the contingency which has actually happened of her surviving him, in which case she would have had, either a legal estate, in fee simple, under the first devise to her, or a right to a conveyance, in fee, under the original trust clause—we think the inferences which would favor such a construction are not sufficiently conclusive to authorize us to disregard the express letter of the codicil, extending the trust to her natural life, and providing that, on her death without issue, the estate should vest in the testator's heirs, or be sold, and the proceeds be divided between them. Without supposing any diminution of affection for his daughter, or any anticipation derogatory to her, the testator might think it sufficient to secure an equal portion of his estate to her during her life; and if she should have no issue, to give it, on her death, to his other heirs, who might be deprived of it, if the absolute fee and power of alienation was vested in her, even after the death of her husband. We suppose then that the codicil, absolutely, supplants the trust clause in the original will; and that as the legal estate, during her life, was vested in the trustees, and was to pass to others on her death without lawful issue, she having in fact died without lawful issue, never had any interest, but a use for life, and perhaps a remainder, contingent on the event of her leaving lawful issue at her death, which did not happen. There was, therefore, no estate in her which could descend to Moses Black, and he is entitled to no portion of his grandfather's estate.

to A no such legal estate as will in case of her death pass to an illegitimate child.

The decree recognizes his right to the interest which his mother was entitled to in the estate of her mother, who died before her; but did not decree it, as we presume, because it was not expressly prayed for, and because the administrator, in whose hands it was, and who, though one of the three heirs of the testator, asserts the right of Moses Black to the property devised to his mother, is, as may be inferred, his statutory guardian. We are, therefore, not disposed to disturb the decree in this respect.

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WAGGENER vs HIGHBAUGH.

Wherefore, no error being perceived to the prejudice of either party, the decree is affirmed.

C. A. Wickliffe and Grigsby for plaintiff; *J. & W. L. Harlan, Robertson and B. Hardin* for defendants.

TRESPASS.

Case 55.

Waggener *vs* Hihbaugh. 3 Cases.

ERROR TO THE HART COUNTY COURT.

Justices of the Peace. Appeals. Trespass. Tobacco. Costs.

January 19. JUDGE GRAHAM delivered the opinion of the Court.

The case stated.

THESE are cases of warrants, in trespass on the case, issued by a Justice of the Peace against Highbaugh for failing and refusing to issue executions in accordance with judgments, theretofore rendered by him as a Justice of the Peace, in favor of the plaintiff against Lemons; each of the judgments being for a sum less than five pounds.

On the trial of these warrants, judgments were rendered for the defendant against the plaintiff for costs. The plaintiff appealed, and filed his appeal with the Clerk of the County Court. Summons on the appeal having been executed on Highbaugh, he appeared at the January term of the County Court, but the plaintiff failing to appear and prosecute his suit, (having perhaps discovered that he had not appealed to the proper Court,) the Court dismissed his suit, and rendered a judgment that the defendant recover of the plaintiff one hundred and fifty pounds of tobacco, at the rate of one penny per lb., and also his costs expended, &c.

Justices of the Peace had no jurisdiction in cases of trespass or trespass on the case prior to the statute of 12 February 1840. (3 *Stat. Law*, 378.)

Each of these judgments is now, by writ of error, before us. Justices of the Peace had not jurisdiction of cases of trespass, or trespass on the case, until it was conferred upon them by the act of 12th February, 1840: (3 *Stat. Law*, 378.) The fourth section of that act gives to the parties litigant the right of appeal to the Circuit Court; and provides that, on an appeal, a

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declaration shall be filed, and the cause proceeded on, as though commenced in the Circuit Court. When the debt, or damages, sought to be recovered before a Justice of the Peace are under five pounds, the law until the passage of that act directed the appeal to the County Court.

The statute of 1840, giving jurisdiction in cases of trespass and trespass on the case to Justices of the Peace, authorizes an appeal to the Circuit Court only.

That act, however, which confers on that officer a right to adjudicate in a class of complaints for injuries not theretofore within the pale of his jurisdiction, gives to the party, supposing himself aggrieved by his judgment, an appeal, not to the County Court, but to the Circuit Court, and prescribes for the trial in the latter Court, the filing of a declaration, &c. As the act conferring the jurisdiction on the magistrate, expressly designates the Circuit Court, as the tribunal to which an appeal shall be taken, and designates the proceedings to be had in the Circuit Court, it follows, that the appeals in these cases were improperly filed in the County Court, that Court not having any authority to entertain jurisdiction thereof.

Where an appeal is dismissed because improperly taken to the County Court, and should have been to the Circuit Court, no tobacco should be adjudged against the appellant on its dismission, but only for costs.

The law awards 150 lbs. of tobacco, at a penny a pound, as damages against a plaintiff, who failing to prosecute his suit, shall be non-suited. But when the law forbids the plaintiff from further prosecuting his suit, it surely cannot be right to amerce him in damages for failing to do that which, by law, he could not do. It seems to us, therefore, that in each of these cases, it was error to render a judgment against the plaintiff for the tobacco. But as Waggener brought the case into the County Court, and the parties were within the jurisdiction of that Court, which generally has jurisdiction by appeal upon all judgments for sums less than five pounds, it seems to us that the judgment for costs incurred by the defendant, was not improperly rendered, notwithstanding the County Court could not rightfully try the appeal.

The Court of Appeals has no jurisdiction to revise a judgment of a County

It is, however, insisted that this Court cannot entertain jurisdiction of the writ of error prosecuted from the judgment of the County Court. The act to amend

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WAGGENER vs HIGHBAUGH.

Court *affirming* or *reversing* a judgment of a Justice of the Peace. But it may revise a judgment dismissing such case and improperly adjudging costs.

"an act establishing the Court of Appeals," approved December 1801, (1 *Stat. Law*, 133,) enacts "that no appeal shall be taken from the County Court on a judgment affirming or reversing the judgment of a Justice of the Peace, nor shall a writ of error be issued from the Court of Appeals to reverse the same." If the judgment of the County Court, be either an affirmance or reversal of the judgment of the Justice, it is manifest that this Court cannot revise that judgment or correct any errors in it; but if it be not either, then, as this Court has the power to affirm or reverse the judgments of all inferior Courts in the Commonwealth, except in cases where that power is restricted by law, we may and should, where a case is brought before us, and not thus restricted, do justice to the parties litigant, by correcting an erroneous judgment. It will be seen, by an inspection of the judgments or orders of the County Court, in these cases, that there is neither an affirmance or reversal of the judgment of the Justice of the Peace. The plaintiff's appeal is dismissed because of his failure to prosecute his suit, and damages and costs awarded against him; but not a word is said about the judgment of the Justice. Suppose that Court had had jurisdiction of the appeal, and that the time allowed by law for prosecuting an appeal had not expired, could this judgment, or order of the County Court, have been plead in bar to an appeal subsequently prosecuted? It seems to us it could not have been so plead. There was no trial on the merits; but, in fact, only a non-suit of the plaintiff for failing to appear and prosecute his suit. We think the cases do not come within the interdict of the act of 1801, and not being forbidden, this Court may entertain jurisdiction of these writs of errors.

Being of the opinion that the judgments of the County Court are erroneous, so far as they award damages of 150 lbs. of tobacco against the plaintiff, the judgment in each case, is, therefore, reversed, and remanded to that Court, with directions to render judgment in

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accordance with this opinion. Each party to pay his own costs in this Court.

Waggener for plaintiff; *Craddock* for defendant.

Willis *vs* Caldwell.

CHANCERY.

ERROR TO THE ADAIR CIRCUIT.

Case 56.

Mortgages. Sureties.

January 19.

JUDGE GRAHAM delivered the opinion of the Court.

The limitation prescribed for bringing suits against sureties by the statute of 1838 (3 *Stat. Law*, 339) must be pleaded at law, and is not available in chancery after judgment at law.

THE third section of the act of 1838, (3 *Stat. Law*, 559) declares that after first July, 1838, sureties on all written obligations other than those provided for in the first and second sections of that act, shall be discharged from all liability on such obligations when seven years shall have elapsed without suit, after the cause of action accrued thereon. The discharge given by this act is legal, and not equitable. Like the ordinary statute of limitations in actions of assumpsit, and other actions at law, if the defendant fails to plead at law, he cannot afterwards in a suit in equity, be permitted to rely on the lapse of time; so in this case, the defendant might have plead at law, the lapse of seven years from the time when the cause of action accrued, and thus have defeated the plaintiff's action; but not having availed himself of that privilege, he now speaks too late, and cannot be heard in a court of equity.

A mortgagee who is a creditor of the mortgagor accepting a mortgage as well for his own benefit as for the indemnity of the sureties of the mortgagor is bound to appropriate the proceeds of the mortgaged estate *pro ratu*.

The complainant, William Caldwell, is not therefore entitled to relief, because of the failure of the obligee to sue, at law, until seven years had elapsed after the note became due. But, by reason of the other matters relied upon in his bill, he is entitled to relief in chancery, but not to the full extent of that given by the decree. The mortgage executed by John J. Caldwell to Willis and Cole, expressly conveys the land, negro, and personal property, to the grantees to secure the payment of the sums of money mentioned in the mortgage, "and to indemnify and keep secure his securities in the

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WILLIS vs CALDWELL.

several cases wherein he has given security." William Caldwell, the complainant, was surety in two of the notes mentioned, and Ewing was surety in another. The sureties, by the terms of the mortgage, had an equitable interest in all the property mentioned in the mortgage; they are in fact virtually mortgagees, though not named as such in the deed. Willis and Cole received the conveyance, not only as a security for the debts due to them, but for the additional purpose of saving the sureties as far as possible from injury. There is no preference of debts, no priority or precedence given to one debt over another. The property was equally bound for the whole, and if insufficient to pay the whole, then so far as its value extends, it should be appropriated to each debt in proportion to its amount to the whole. The mortgagees should, as to the sureties, be regarded as trustees, holding the title for the mutual benefit of themselves and the sureties. It would be manifestly unjust, first to take a conveyance of all their debtors property, thereby preventing the sureties from subjecting it to their demands, if they should pay the debt, or at least only subjecting it subject to the mortgage, and then, after thus taking the property in their own hands, to appropriate the whole of it to the payment of their other demands, to the exclusion of those for which they have personal security. Basing a decree on the principle of apportioning the property to the debts, there is no difficulty in rendering a decree. The complainant, Willis, received the negro man Harry at $850. She is justly chargeable with $100 for the rent of the land. The land has, under the decree of the Court in this cause, been sold for the sum of $1300. Deduct from this last sum the $20 allowed the commissioner for his services, there remains the sum of $1280, to which, adding the aforesaid $850 and $100, we have the agregate of $2,230. Take the several sums due to Mrs. Willis, as mentioned in the mortgage, and add thereto the sum of $670 42, paid by her on the 28th January, 1842, to Cole, the whole sum due to her will be thus ascertained. Appropriate, *pro rata*, the said

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sum of $2,230 to the several sums due, and giving to the two notes on which William Caldwell is surety, and on which judgment, at law, has been had, the portion of credit, to which each one is entitled, will be thus ascertained, and should be directed to be done by decree. For these sums, the injunction granted the complainant should be perpetuated, but for the residue of the judgment enjoined, the injunction should be dissolved with damages. The complainant is entitled to his costs in the chancery suit.

We do not regard the proof as sufficient to show such a purchase of the land by Mrs. Willis, as can be enforced. If one was made, it was by parol, and is expressly denied by both the supposed contracting parties. All that the complainant can ask, is that the sum for which the land sold be appropriated as herein before suggested to the payment of the mortgage demands. Nor shall she be charged with the personal property used by John J. Caldwell. It does not appear that she had notice of the existence of the mortgage until after the crop had been consumed, and the personal property, which was of but small value, had been wasted or used by the mortgagor. Besides this, the complainant had an interest in the mortgage, not indirectly or impliedly, but expressly secured to him; and he might have interferred, and, by proceedings in equity, have prevented the waste of the property, real and personal.

But for the reasons herein suggested, the decree of the Circuit Court is reversed, and the cause remanded, with directions to render a decree in conformity with this opinion.

Loughborough & Ballard for plaintiff; *B. & A. Monroe* for defendants.

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CHANCERY.

Case 57.

Upshaw *vs* McBride, &c.

ERROR TO THE GENERAL CIRCUIT.

Limitation. Estoppel. Presumption.

January 21. JUDGE SIMPSON delivered the opinion of the Court.

Case stated. IN the year 1798, William Chamberlain and Lyne Shackelford executed to Edwin Upshaw an obligation by which they bound themselves to convey to him a tract of land containing one thousand acres, entered and surveyed in the name of Javin Miller, and to warrant the title to the same, to the said Upshaw, his heirs, &c.

In the year 1803, Chamberlayne conveyed said land to Upshaw by deed, containing a clause of general warranty. The land had been previously conveyed to Chamberlaine by one Armstrong, to whom it had been conveyed by Mary Parsons, who claimed to be the mother and heir at law of Javin Miller, deceased, in whose name the land had been entered and surveyed, and to whom a patent issued in the year 1824, after his death. Lyne Shackelford does not appear ever to have had any title to the land.

This suit in chancery was commenced by Upshaw in the year 1840. He states the foregoing facts in his bill, and alleges that about the year 1819, James Metcalfe, who had married one of the daughters of Lyne Shackelford, took possession of said tract of land, in conjunction with some of the other heirs of Shackelford, who had died, claiming the land as having belonged to Shackelford, and asserting a right to it as his heirs. That Metcalfe afterwards, with full knowledge of complainant's claim, caused two surveys of five hundred acres each, to be fraudulently made on Kentucky Land Office warrants, embracing the whole of the land; and, by further fraud, obtained patents therefor, in his own name, elder in date than the patent to Javin Miller.

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That Metcalfe, after the patents were issued, had conveyed portions of the land to the other heirs of Shackelford, by which the fraudulent combination among them to cheat him of out the land, was fully demonstrated. He made the heirs of Shackelford defendants, alleged that they had received assets to a considerable amount, and prayed that they might be required to execute to him a deed for the land, in fulfilment of their ancestor's obligation and surrender to him the possession of it.

Metcalfe answered, denying that he took possession of the land, claiming it under Lyne Shackelford, who he denies ever had any title to it. Admits that he appropriated and obtained patents for it, under Kentucky treasury warrants, believing that the land was vacant. Denies all knowledge of the complainant's claim or right to the land; and alleges that he and those claiming under him, have been in possession of it ever since the year 1819, claiming it as his own. He denied that his wife, or himself, had ever received any assets from Shackelford's estate. He states that if Lyne Shackelford ever executed such a bond as the complainant relies upon, which is not admitted but denied, it was executed by him merely as the surety of Chamberlaine, and has been long since satisfied. He relied upon his elder title, the statute of limitations, and the staleness of the complainant's claim.

A vendor without title afterwards acquiring title it enures to the benefit of his vendee—but if the heir of such vendor acquire title he cannot be compelled to surrender it or to answer in damages for failing to convey unless he received assets from the ancestor.

As no right or title to the land descended from Shackelford to his heirs at law, the complainant cannot demand from them a specific execution of the contract of their ancestor. If Shackelford had been the owner of the land, or had any title to it, either legal or equitable, at the time he executed his obligation to the complainant in conjunction with Chamberlaine, and that title had passed to his heirs at law upon his death, they would have been compelled, in a Court of Equity, to have conveyed it to the complainant. But it does not follow, that they are bound to convey him any other title they may have acquired to it, even with a knowledge of his claim. Admitting that Shackelford was

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UPSHAW vs McBRIDE &c.

one of the vendors, then any title which he might have subsequently obtained, would have enured to the benefit of his vendee. But his contract only imposes on his heirs an obligation to convey any title which may have descended to them from him, or to respond in damages, so far as they may have received assets for a breach of any of its stipulations. In other respects they occupy the attitude of third parties, and as their ancestor never had any title to the land, they as heirs, are under no obligations to convey it to the complainant, or to surrender any title to it, which they have acquired since his death.

The heir of one who has conveyed land is estopped to deny that the ancestor had title at the time he conveyed.

Had Shackelford joined in the execution of the deed made by Chamberlaine to the complainant, his heirs would have been estopped to deny that he had title at the time. But that estoppel could not have imparted any equity to the complainant, or given him any right to relief in a Court of Chancery, although it would have enabled him to have maintained a suit, at law, against the heirs for the land.

A bond for conveyance, under the circumstances of the case presumed to be satisfied, after the lapse of 40 years.

There is no evidence that Metcalfe or his wife ever received any part of Shackelford's estate after his death. The complainant did exhibit the will of Shackelford, by which it appeared, that the testator had made specific devises to his children; and had also devised to them the residue of his estate, after the payment of his debts. But there is no testimony that any part of the estate was ever received by Metcalfe or his wife, and as they have denied, any of it ever came to their hands, the probability is, it was all exhausted in the payment of debts. The covenant of warranty, therefore, creates no obligation on Metcalfe, even if it could for any purpose, be relied upon by the complainant in a Court of Equity.

Inasmuch, however, as the bond executed by Chamberlaine and Shackelford was dated in 1798, and a deed for the land was made by Chamberlaine to the complainant in 1803, and this suit was not commenced until upwards of forty years afterwards, the presumption is almost conclusive that the stipulation for a convey-

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ance of the title, was considered by the parties as fully complied with and satisfied by the deed executed by Chamberlaine. This presumption is fortified by the fact, that Shackelford had no title to the land, it having been previously conveyed to Chamberlaine; and it is not repelled by any of the facts or circumstances proved in the cause. If the stipulation in the bond for a conveyance of the land is to be regarded as having been complied with, and we think it should under the circumstances, the consequence is, that the complainant's equity, so far as it is based upon a right to a specific execution of the contract, has completely failed.

One having taken possession under a particular title cannot, whilst so in possession, assert an adversary title.

If, however, the defendants took possession of the land under the complainant's title, claiming it as the heirs of Shackelford, and afterwards, while so possessed, obtained an elder legal title, do these facts create an equity in the complainant, and authorize him to apply to a Court of Chancery for a surrender and conveyance of the legal title and the possession? They do not, in our judgment, have this effect. If they acquired the possession of the land under the complainant's claim, the defendants could not, whilst in possession, set up and rely upon any other claim in opposition to it, unless they had openly assumed a hostile attitude and possession, with the knowledge of the complainant, and had continued such adverse holding a sufficient length of time to bar his right of entry. But they would be under no equitable obligation to convey to him the title thus acquired, but might, after having restored the possession, if they were bound to do so, assert their own title to the land.

But the complainant's remedy on this ground would be in a Court of Law. If the defendants entered under his title, and in subordination to it, they are estopped to deny it, or to rely upon any other title, until they restore the possession to him. His legal remedy is full and ample, unless he has lost it by negligence and unreasonable delay in asserting his rights. If he has permitted the defendants to continue an open and notoriously adverse, uninterrupted possession, until his

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HASKELL vs BAKEWELL, FRANKLIN BANK vs SAME.

right of entry has been barred, that does not give him a right to relief in equity. His remedy is purely legal; and the decree of the Court below dismissing his bill was correct.

Wherefore the decree is affirmed.

L. Hord for plaintiffs; *Morehead & Reed* for defendants.

Haskell *vs* Bakewell,

Franklin Bank *vs* Same,

CHANCERY.

Case 58.

ERROR TO THE LOUISVILLE CHANCERY COURT.

January 22.

JUDGE GRAHAM delivered the opinion of the Court.

Case stated.

THE complainants being judgment creditors of W. G. Bakewell, instituted, severally, a suit in chancery to set aside, as fraudulent, a conveyance of a lot of ground, No. 61, in Louisville, made by Bakewell to John Brand, by deed, dated 28th April, 1833, and a mortgage from Bakewell to Brand on another lot of ground, the mortgage being dated 10th January 1842, The deed was made without Brand's knowledge, and it does not appear that he was apprised of its existence until a year after its date. It was, however, acknowledged before the Clerk, and recorded in the proper office in December 1833. On the 3d May, 1834, Bakewell wrote to Brand & Son a letter, in which he uses the following language: "I leave for New Orleans this day. Lot No. 61, corner of Main and 10th streets, in this place, (Louisville,) is recorded in the name of John Brand, which, if my debts to your worthy and much esteemed family are all paid, and I should die, is to be held three years, and then transferred to my wife; if she is not living then, I wish it transferred to my brother, T. W. Bakewell. Having a snug little fortune besides this lot, I took the liberty of transferring it to my friend J. B., to have it entirely out of the reach of the casualties of mercantile life." Bakewell made his contemplated trip

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to New Orleans, and returned home. It is proved that on the 28th December, 1834, Bakewell again wrote to Brand, in which, after mentioning the deed for lot 61, sent by Edward McCallister, Esq., some time previous, he says: "I have since paid every debt I owed at that time, and I now, beg the favor of you, as life is uncertain with all of us, to mention this lot in your will, or so arrange it, that, in case we are taken by surprise, my wife will have this lot free and distinct from all my other concerns." In answer to which letter, (the same witness proves) that Brand, in a letter to Bakewell, dated 30th December, 1834, says: "With regard to the deed for lot No. 61, Main street, Louisville, I made a codicil to my will immediately on receiving it, to-wit: it is further my will and desire, that, whereas, a lot of ground situated in the city of Louisville, containing about half an acre, known by its number, 61, and corner of Main and Tenth streets in said city, which was deeded to me by my particular friend, W. G. Bakewell, Esq., and his wife Alicia, by deed, bearing date 28th April, 1833, as recorded in the Clerk's office of Jefferson County Court; now it is my will and desire that the above named lot, with all the appurtenances, (at my death,) shall be deeded, in fee simple, to W. G. Bakewell's wife Alicia," &c. It is also proved that Mrs. Bakewell copied Bakewell's last letter to Brand, and when Brand's answer was received, she folded it up with the copy, and kept them in her possession.

Bakewell was the factor of Brand, and received, occasionally, bagging, rope, &c., for him and his son, and sold them. From the accounts between the parties, at the date of the deed, and at the dates of Bakewell's letters, it does not appear, that at either of said dates, he owed J. Brand any thing. At the date of the deed, the account exhibited, shows that he owed Brand & Son about two thousand dollars. There were, however, running accounts between the parties. At the time of the mortgage in 1842, he appears to have been largely in debt to Brand. There is no evidence that Bakewell except as to Brand, or Brand & Son, was owing any

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HASKELL vs BAKEWELL. FRANKLIN BANK vs SAME.

person at the date of the deed, or of the letters in December, 1834. He was a merchant, engaged in large business, and no doubt, at the date of the deed, and indeed at all times, owed some amount to persons with whom he had dealings, as is customary with most persons largely engaged with mercantile transactions; but it is proved by the uncontradicted and unimpeached testimony of several witnesses that at and before the date of the deed, in 1833, he was a wealthy merchant in fine credit; that he had estate to the value of from one hundred thousand to one hundred and eighty thousand dollars, and that he might safely, without any danger of imputation of fraud, have secured to his wife ten times the value of the lot conveyed to Brand. He continued in these prosperous circumstances until the years of 1841 and 1842, when he failed to a large amount. It is not shown at what time the liabilities accrued which caused his ultimate failure. The debt to Haskell was created in 1839, and the judgment which the Franklin Bank obtained against him, was in April 1843. The date of the transaction on which the judgment was had, is not stated in the record. It is proved that Bakewell, after this conveyance, listed the property for taxation, paid the taxes, rented out and received the rents of the property as his own, and, at one time, was about to erect a building on the lot. It is also proved, that at the time of Bakewell's failure, he owned a large real estate in Louisville and Covington, and that his wife (trusting, as is said, no doubt truly, to her title to lot 61,) relinquished her right of dower in all said property, and thereby permitted the creditors to have the entire proceeds thereof. She is now dead, and died childless, and her heirs claim the lot 61.

Decree of the Chancellor.

The foregoing are substantially the facts of these two suits in chancery, which were consolidated and heard together. The Chancellor dismissed the bills without prejudice, and the complainants have brought the cases to this Court for revision.

One, who is not in debt, may convey to his wife, or other relative, a portion of his estate, and such convey-

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HASKELL vs BAKEWELL. FRANKLIN BANK vs SAME.

One not indebted may settle property on his wife, if it be not done with the intent of going in debt.

ance cannot be held as fraudulent, unless it was made with the intention of becoming indebted, and the object of the deed was to prevent the subjection of the property to the payment of such future debts. It is often regarded by persons engaged in hazardous pursuits, to be a sacred duty to wife and children, to set apart, by conveyance, for their use, a certain and reasonable portion of their estate, when they are free from the shackles of debt, and thereby to keep them somewhat secure from suffering the ills of poverty, to which those engaged in the trafic of buying and selling, seem to be peculiarly liable. If this object be carried out, freed from all fraudulent intents, it cannot be contemned. A deed for real estate, recorded in the office of the County Court, in which the land lies, is open to the inspection of all who think proper to examine the public records; and he who contemplates giving credit to another, on the faith of real estate, knows well where he may ascertain whether it in truth belongs to him to whom he is about to give credit. According to the evidence in this cause, Bakewell might not only in 1833, but for some years afterwards have conveyed this, and more valuable lots to a trustee for the benefit of his wife, and no one could have suspected him of any fraudulent design, nor could a subsequent creditor have successfully assailed such conveyance. Having attempted to effect the same object by a more circuitous and awkward mode, and to the object of his affections a more dangerous mode, ought the transaction to be now set aside because of his failure thus to convey, directly and immediately, to his wife, or to a trustee, for her benefit? The interest of his wife was in peril, until the reception of Brand's letter in December 1834; but that letter gave that protection to the wife which the deed ought to have done, and which the husband intended should be done. When this letter was written and received, there is no proof that Bakewell then owed one cent to any human being; the deed was publicly recorded; any creditor could have seen it at any time. It is not pretended that these complainants, or others, gave him

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credit because of lot No. 61. The facts that he paid the taxes, rented the property, and received the rents, do not militate against the claims of his wife or her heirs. If the property was beneficially hers, it was his duty, as husband, to attend to her interests, there being no intervening trustee to manage the estate for her. In view of the whole case, as presented in this record, it does seem to us, that no injustice has been done to the complainants; that no fraud was contemplated in the transaction, and that this lot cannot be subjected to their demands.

As to the mortgage, the parties do not seem to have paid much attention to it. If the whole six thousand dollars secured by it, is not justly due to Brand, the parties are not precluded from investigating the validity of that mortgage, if they think proper to do so, inasmuch as their bills were not dismissed absolutely, but are only "dismissed without prejudice to any other suits for same causes."

As we do not perceive any error in the decree of the Chancellor, it is therefore affirmed.

Thruston & Pope for plaintiffs; *Pirtle & Speed* for defendants.

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CHANCERY.

Haggins's heirs, &c. *vs* Peck, Executor of Gilman, &c.

Case 58.

ERROR TO THE MONTGOMERY CIRCUIT.

September 29.

JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

MICHAEL FISHELL having a debt on Thomas Flahaven for seven hundred and seventy dollars, secured by a mortgage on a large tract of land, on the 26th February, 1821, entered into a written agreement with James Haggin and Thomas Duckham, by which the two last named individuals bound themselves to pay him for his debt on Flahaven the sum of eleven hundred dollars, in three annual instalments, and he agreed, upon the

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payments being made or secured, to transfer to them, without recourse, the debt on Flahaven and the mortgage executed to secure its payment. At the time this contract was entered into, the debt on Flahaven, and the interest that had accrued thereon, exceeded very considerably the sum which Haggin and Duckham agreed to pay to Fishell.

On the 29th March, 1825, Fishell sold to Mrs. Gilman one moiety of the debt on Haggin and Duckham, and transferred to her one half of the mortgage on Flahaven which he had retained to secure its payment.

In 1827 a decree was rendered in a suit brought to foreclose the mortgage executed by Flahaven and to subject the land to sale to pay this debt on Haggin and Duckham, all of which was then due and unpaid; and a sale having been made under the decree, the whole land mortgaged was sold for the sum of $501, and purchased jointly by Fishell and Mrs. Gilman. The commissioner who made the sale reported to the Court that Fishell was the purchaser, and in consequence thereof a deed was decreed and made to Fishell alone; but it conclusively appears that the purchase was made for their joint benefit, and, therefore, as to one moiety of the land, Fishell held the title in trust for Mrs. Gilman.

In 1830, Peck, as the agent of Fishell and Mrs. Gilman, sold to Henry Beaty a small part of this land, and afterwards on the 12th day of February, 1831, Duckham purchased of Mrs Gilman her undivided interest in the whole of the residue of the land at the price of five hundred and fifty dollars; Fishell having on the previous day sold and released to Haggin the undivided moiety of said land which belonged to him.

Mrs. Gilman having died, Peck, as her executor, brought a suit and obtained a judgment at law against Duckham for the price of the land which he had stipulated to pay, and not being able to collect the amount by execution, he instituted this suit in chancery against Duckham to enforce the vendor's lien on the land, and Beaty not having paid the whole amount of the pur-

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chase money which he owed for the part purchased by him, he was also made a party for the same purpose.

Fishell having obtained the legal title in the manner before mentioned, and having never conveyed it to Mrs. Gilman, and having died, his administrator and heirs were also made parties. Haggin having died, his personal representative and heirs were also made parties. And Dudley having presented a petition, setting up a claim to the land by purchase from Fishell's heirs since his death, he was also made a party.

By an amended bill the complainaint alleged that no part of the eleven hundred dollars which Haggin and Duckham stipulated to pay Fishell for the debt on Flahaven had been paid, except the sum of $501 raised by the aforesaid sale of the land mortgaged by Flahaven, and as his testatrix, Mrs. Gilman, was entitled to one half of the debt on Haggin and Duckham, he prayed for a decree against Duckham and the heirs and representatives of Haggin for such unpaid moiety of the debt.

The decree of the Circuit Court.

The Circuit Court decreed a sale of the land purchased by Duckham to pay the purchase money, and also decreed the payment to the complainant of one half of the residue of the debt due upon the contract made by Haggin and Duckham with Fishell.

Various objections are made to that decree which we will consider and dispose of in the order in which they naturally arise.

The very foundation of the complainant's claim is attacked. It is contended that Mrs. Gilman acquired the transfer from Fishell fraudulently. That the pretended consideration was an invalid and unreal claim to a tract of land in Hardin county, to which she had no title. That Fishell was induced by fraudulent misrepresentations to make the contract and execute the transfer to Mrs. Gilman without any actual consideration, and consequently that the transfer is void, and that Fishell's heirs or their vendee, Dudley, has a right to the moiety of the land claimed by Mrs. Gilman and sold to Duckham.

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Fishell's heirs did not appear or file an answer. His administrator answered, and after alleging that there was no consideration for the transfer, but that it was procured fraudulently, called upon the executor of Mrs. Gilman to state fully and explicitly the nature of the consideration, and in what it consisted. The executor responded, denying all fraud, stated the consideration to have been the conveyance, by deed, of five hundred and fifty acres of land in Hardin county by Mrs. Gilman to Fishell, and that the nature of the title was fully explained to and understood by Fishell.

Where there has been a conveyance of land, & fraud is alleged and denied, and no proof of the alleged fraud, the sale cannot be set aside.

The answer of the executor, so far as it details the consideration of the transfer, is responsive to the call made upon him by Fishell's administrator, and must be taken as true, in the absence of all testimony contradicting it. The contract then having been executed upon the part of Mrs. Gilman by a conveyance for the land in Hardin county, it devolves upon those who alledge the fraud, and the want of title, to establish those facts by proof. No testimony has been taken for this purpose, and it is, therefore, not material whether the effort of the executor of Mrs. Gilman to exhibit a regular title has or not been successful.

A rescision of a contract for land which has been conveyed to the ancestor, cannot be made at the instance of the executor alone; the heirs should unite.

There is also another reason why the complainant's claim cannot be resisted on this ground. The title of Mrs. Gilman to the land in Hardin county was conveyed to Fishell, and has descended to his heirs. They have not offered to rescind the contract, or reconvey the land. For any thing that appears to the contrary, they may be opposed to it. The administrator has no right to demand a rescision. The contract could be rescinded only on the application of the heirs, and upon the presentation by them of such a case as would justify a Court of Equity in entering a decree to that effect. As, therefore, the transfer is still in force and no equitable objection to its enforcement by the complainant has been manifested, the decree cannot be successfully assailed upon this ground.

It is not error to decree a sale of an undivided in-

It is also contended that the heirs of Beaty, he having died, should have been made parties, and that the

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land sold to him should have been laid off and bounded, and that Duckham's interest in the residue should have been ascertained and defined before any decree was rendered for the sale of the land.

terest, or part thereof in land held by defendant to pay a debt or discharge a lien without dividing the land.

The sale to Beaty was made previous to the sale to Duckham. It was recognized in the sale to the latter, which was made subject to it. Beaty was made a defendant to compel a payment by him of the balance of the purchase money which he owed. Having paid it during the pendency of the suit, and the payment having been acknowledged of record, he had no further interest in the suit. He was not a necessary party to a suit against Duckham to compel him to pay the purchase money which he owed. Nor was it necessary to have the land surveyed which Beaty had purchased, before any decree was rendered for the sale of Duckham's interest, he having purchased subject to the sale to Beaty. The quantity and location of the land sold to the latter, was sufficiently identified. And as Duckham had purchased the residue of the undivided moiety of the tract, it was not erroneous to decree a sale of the land he had purchased, without either fixing the precise boundaries of Beaty's purchase, or dividing the land between Duckham and the proprietors of the other moiety; more particularly as it was a very large tract of mountain land, near twenty thousand acres, the division of which was not asked for by any of the parties, and would have greatly increased the cost, without in all probability producing a corresponding increase in the price for which it would have sold.

The law does not require land sold under decrees in chancery to satisfy vendor's lien, to be valued as land sold under execution. (1 *Dana*, 185.)

The commissioner appointed to make the sale, was not directed by the decree, to have the land valued, and the sale was made without any regard to the valuation law. It is contended that for this reason the decree is erroneous. The statute now in force upon the subject of the sale of land, under execution, does not, so far as the valuation principle is concerned, apply to a commissioner's sale, under a decree in a suit in chancery. It was so expressly decided in the case of *Blakely* vs *Abert*, (1 *Dana*, 185) which, like the present,

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was a suit to enforce the vendor's lien for the purchase money on a sale of land.

Gillman's executor had another judgment at law against Duckham, in addition to the one which he obtained against him on account of the sale of the land. An execution appears to have issued on that judgment, and to have been levied upon this land, and the interest of Duckham sold, and purchased by the plaintiff in the execution at the price of a few dollars. No notice is taken of this sale either in the pleadings or the decrees of the court. It is now argued that it was irregular and improper to render a decree for the sale of the land, without first setting aside and vacating the sale under execution.

It is a sufficient answer to this objection, that as Duckham had no interest in the land subject to execution, nothing passed by the sale, and it was properly disregarded and treated as a nullity by the parties and the court. It might form an obstacle in the way of the plaintiff in proceeding at law by execution to collect his judgment, to the extent of the credit entered on account of the sale, unless the sale be set aside, and the return of the officer quashed. But as it is manifest that the sale was wholly invalid, it was unnecessary in this suit in chancery, which was carried on by the plaintiff in the execution, to sell the same land for the payment of another debt, to notice this sale at all. Besides, it was not brought before the court in the pleadings. The only evidence of it in the record, is a return on a copy of an execution which issued on the judgment. The sale may have been quashed for anything that appears to the contrary. But be this as it may, as this matter was not presented to the court, or any question made in reference to it in the pleadings, it was not before the court for adjudication, or a proper subject for its action.

Where the Court direct the interest of the defendant in a particular tract of land to be sold to sat-

A further objection to the decree is, that it directs Fishell's heirs and the other defendants to convey to the purchaser, at the sale made by the commissioner, the interest of Duckham in the land, without defining

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the extent of that interest. The decrees of the Court, in directing a sale of the interest of Duckham without specifying the nature and extent of that interest, are informal and not as precise and certain as they should have been. But as the pleadings and exhibits show, clearly and without doubt, that the interest of Duck ham was an undivided moiety of the whole land, except the part sold to Beaty, any uncertainty in the decree on this point, is obviated by the record. Indeed the answers of the defendants raise no question on this subject; but the interest of Mrs. Gilman, and the interest of Duckham as purchased from her, seems to have been treated and considered by the parties and the Court as an undivided moiety of the land. The omission, therefore, to express in the decree a fact which is substantially admitted in the pleadings, cannot be regarded as sufficient to require a reversal of the decree.

isfy the purchase money without stating in the decree the extent of that interest, the decree tho' informal, will not be erroneous when there has been no disagreement in the statement of the parties in the pleadings in the cause as to the extent of that interest.

The most serious question, however, arises on the decree against Duckham and Haggin's administrator and heirs for the balance of the money due on the contract for eleven hundred dollars. This was originally a mere legal demand. At the institution of the present suit, there was no lien upon the land to secure its payment. The mortgage executed by Flahaven had been previously foreclosed and the mortgaged property sold. The balance of the debt was a personal demand, growing not out of a purchase of land, but out of the purchase of another debt secured by a mortgage upon land. This demand was not in any manner connected with the claim against Duckham. It merely formed a part of the history of the transaction between Mrs. Gilman and Fishell, in detailing the mode in which Mrs. Gilman acquired her right to the moiety of the land she sold to Duckham. Can a Court of Equity render a decree *in personam* upon this demand? Nothing has been specially relied upon in the pleadings to give to the Court jurisdiction. The Court below assumed it upon the ground that having jurisdiction for one purpose, it would go on and make a final end of the con-

Tho' the chancellor having acquired jurisdiction of a subject may, in order to prevent multiplicity of actions, do full justice between the parties, he is not warranted in deciding other matters between the parties, whether legal or equitable, having no connection with the subject giving the jurisdiction.

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troversy between the parties. But this doctrine, if admitted to be applicable in some cases, can have no influence upon the question in this, inasmuch as the contract upon which this part of the decree is based, was separate, distinct, and independent of the one which conferred upon the Court jurisdiction in the case. It does not follow because a Court of Equity has jurisdiction of one matter of controversy between parties, that, therefore, it may proceed, for the purpose of putting an end to litigation, to take cognizance of all matters of controversy between the same parties, whether legal or equitable.

By the common law the only remedy against one joint obligor who had died, was in equity; this was remedied by the statute of 1796. (1 *Stat. Law*, 318.)

Upon the death of one joint obligor, the only remedy at common law against his estate, was in equity. The defect which existed in the legal remedy has been removed by the statute of 1796, (1 *Stat. Law*, 318,) which authorizes an action at law to be brought in such cases against the deceased obligor, in the same manner as if the obligors had been bound severally as well as jointly.

Where by the common law courts of equity had jurisdiction, and the same jurisdiction was conferred upon courts of law, the jurisdiction of the courts of equity is not ousted but is concurrent. (1 *Story Eq.* 80, 96.)

But when Courts of Equity originally obtained and exercised jurisdiction, it is not overturned or lost by the courts of law now affording a remedy, when at one time they refused it, although the power to give the remedy has been conferred by express legislative enactments. In such cases the jurisdiction of the courts of law is concurrent and not exclusive: (1 *vol. Storey's Equity, pp.* 80, 96.)

In a suit in chancery against the representatives of a deceased obligor to have satisfaction of a legal demand, the surviving obligor is a necessary party, and service of process against such survivor in the county where the suit is bro't, gives the court jurisdiction as to the heirs of the deceased obligor.

It follows, therefore, that as the contract in this case was a joint one, and one of the joint obligors had died, the Court had jurisdiction to decree a payment of the demand by the representatives of the deceased obligor, particularly as it appeared that the survivor was insolvent and that a suit at law against him would be entirely unavailing. And under the circumstances a decree against the survivor was proper, as no judgment at law had been recovered against him on the contract.

And as Duckham would have been a necessary party to a suit against Haggin's representatives, brought alone or the purpose of obtaining relief on this joint contract,

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HAGGINS' H'S &C. vs PECK, EX'R. OF GILMAN &C.

and as he resided and was served with process in the county where the suit was instituted, the Court had jurisdiction, although the heirs and representatives of Haggin were not served with process in that county.

But there is another ground upon which the Court had jurisdiction to decree relief to the complainant on this contract. The transfer of one half of the demand to Mrs. Gilman did not authorize her executor to sue at law in his own name. Notwithstanding this transfer, the legal title to the demand still remained in Fishell, the assignor. But as he subsequently transferred and released the residue of the demand to Haggin, who was one of the obligors, no suit at law could be maintained by Gilman's executor in the name of the assignor for the amount due to his testatrix on the contract. The legal remedy was, therefore, entirely lost, and the only remedy he had either against Duckham or the administrator and heirs of James Haggin, deceased, was in a Court of Equity.

The Court did not, as the objection made to it on this account supposes, decree the payment to Gilman's executor of the whole balance due upon the contract, but only one half of it. The transfer or release by Fishell to Haggin in 1831, expressly recognizes a previous transfer of one half of the demand to Peck, the executor of Mrs. Gilman, and it was evidently the residue of the demand only that was released to Haggin.

Wherefore, there being no error in the decree to the prejudice of the plaintiffs in error, it is affirmed.

R. Wickliffe and Loughborough for plaintiffs; *Apperson, Robertson, Peters, Cates and J. & W. L. Harlan* for defendants.

A petition for a re-hearing being filed in this case, the Court made the following response thereto:

The husbands of heirs, who are sued, dying pending a suit in chancery to subject lands de-

The chief matter relied upon in the petition for a re-hearing is, that the decree should have been reversed for the want of proper parties. During the pendency of the suit, the husbands of two of the daughters of James Haggin died, and their death was suggested up-

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on the record. It is contended that the personal representatives of the deceased husbands should have been made parties. They, however, had no interest, so far as it appears, in any of the matters in controversy. After the death of the husband, the wife being one of the heirs at law, was the necessary and proper party, so far as the real estate was concerned. The interests of the heirs and distributees of Haggin in his personal estate, were placed in the hands of his administrator, whose duty it was to attend to them, and he was the only necessary party so far as those interests were involved. Had it appeared that a portion of the personal estate had been distributed, and passed into the hands of the husbands during their lives, their estates to that extent might have had an interest, and the Court might then with propriety have required their personal representatives to have been made parties; but we would not be understood as determining that even, then they would have been necessary parties.

scended to their wives, no revivor is necessary against the personal representatives unless they have received of the estate of the decedent, and it is designed to hold them responsible.

Another objection made to the decree is, that it was rendered against the heirs of Haggin, without any averment in the pleadings, that any estate had descended to them from their ancestor. As the decree is not against them personally, but according to its provisions the sums decreed is to be made out of the assets to them descended, in the event that it is not made out of the assets in the hands of the administrator, they could not be prejudiced by it, although they had obtained nothing by descent. But this objection is founded on a misconception of what the pleadings actually alledge. The effort of the complainant was to hold Haggin's interest in the land liable for the debt, and to have it subjected in this suit to its payment by a decree made for that purpose. To this end the interest of Haggin in the land was specially set fort, and it was insisted that this interest in the hands of his heirs ought to be sold for the payment of the complainant's demand. Although, therefore, no express allegation was made, that real assets had descended to the heirs, it was made in substance, and the

It is no objection to a decree against heirs to be levied of estate descended—that there is no allegation that estate had descended.

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Broadwell's Adm'r. &c. vs Lair &c.

facts alleged made it manifest that such was really the case.

Nor is there any weight in the objection that Fishell had not specifically executed his contract with Haggin. The liability of the latter for the debt did not arise out of a sale of the land, but of the debt on Flahaven. Haggin had it in his power, by paying the sum agreed upon, to have acquired a complete and full right to the debt which he had purchased. No further act was necessary on the part of Fishell. If Haggin has derived no benefit from his purchase of this debt, it was the consequence of his having failed to comply with the agreement he had entered into.

The petition for a re-hearing is overruled.

Chancery.

Case 60.

Broadwell's Adm'r. &c. *vs* Lair &c.

Appeal from the Bourbon Circuit.

Usury.

January 18.

Chief Justice Marshall delivered the opinion of the Court.

[This bill was filed by Charles Lair and his trustees or assignees to reclaim usury. The first part of the opinion in this case decides no new principle, but contains a statement of the case, and calculations, showing the probable state of the accounts between the parties.]

Where property is received at greatly more than its vendible value in payment of a debt in which there is usury, in consideration of a release of the usury, there can be no reclamation of the usury.

But it is alleged by Broadwell that the land was taken at a price greatly above its vendible value at the time, in consideration of a release executed by C. & I. N. Lair, releasing all claim of usury in his transactions with them. The release itself states that it constituted the inducement for taking the land at a very high price. And the deduction from the evidence is that it could not have been sold for more than about $30 per acre, if for that much, upon the terms of paying the whole price upon receiving the possession or even in a year afterwards. Broadwell allowed $40 an acre for

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it, to be credited on I. N. Lair's debt, and on C. Lair's debt as it existed at the time possession was to be delivered. And he prays that if the release which constituted the inducement for allowing so high a price be disregarded and deemed ineffectual, the contract for the land may be rescinded, and that he may have a lien on it for his debt and legal interest. The other parties consented to a rescision, but at the final hearing the representatives of Broadwell having been allowed an election, chose to retain the land, which appears to have appreciated in value. And the question is whether in now settling the claim for usury, the excess allowed above the actual value of the land shall be considered as a payment of so much money, or as a set off against so much of the usury included in the debt. As it seems to be entirely certain that the excess in the price of the land was allowed in consideration of the usurious interest included in the debt which paid for it, there seems to be an evident justice and propriety now, when the debt is to be purged and the usury disallowed, that the excess of price allowed for the usury should be disregarded. And it would seem to be unjust to diminish the real debt with its legal interest further than there was a real payment of it, or to hold the one party to the nominal price allowed as including usurious interest not to be reclaimed, and at the same time to allow the other party to reclaim the same usury as if actually paid. And as the debtors in reclaiming the usury avoid, as they have a right to do, so much of the contract as was based upon the usury, so, we suppose, Broadwell might in that case, without offering to restore the land and rescind the entire contract, claim that he should be charged only with the value of what he had actually received, and not with so much of the conventional price as was based upon the usury. And as this would have been an equitable claim, if he had made no offer or prayer for a rescision, we consider it as not affected by the withdrawal of that prayer, though it may have been produced by an appreciation in the value of the land. But lest injustice might be done by

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BROADWELL'S ADM R. &c. vs LAIR &c.

assuming the value of the land to have been but $30 per acre, or one fourth less than was allowed for it, we assume it to have been $32 per acre, thus making, as we think, all reasonable allowance for diversity of opinion and of statement among the witnesses. We therefore diminish the credit of $5,991 46 by 20 per cent. or one-fifth, which leaves $4,793 17 to be applied as a credit on the 1st March, 1843, to the sum then legally due, and shows a balance of $3,125 17, which being deducted from the amount of the note then due of $8,652 86 leaves $5,527 69 as the sum which should have been credited on the note as usury instead of $7,318 49 credited by the decree.

It is contended on the part of the appellees that they are entitled to a further credit on account of the usury included in the debt of I. N. Lair, which was extingushed by the conveyance of the land. But as one of the tracts conveyed in payment was his, and not only discharged his own but a portion of his fathers debt, he alone and not his father had a right to reclaim the usury thus paid by him on his own debt. He did in fact file a bill reclaiming it, which, with the proceedings on it, is brought into this record as an exhibit. From which it appears that Broadwell, having pleaded the release above mentioned, and the Court having refused to reject the plea on the complainant's motion, he discontinued his suit. And although he is made a party in the present suit, he does not attempt to re-assert or revive his claim for repayment of the usury. Nor do the complainants set up the claim as belonging to them, or pray for its payment, or for any action in relation to it, except that in case of a recision of the sale of the land and a lien being allowed to Broadwell for what should be legally due the usury paid by I. N. Lair, should be taken into the account, The bill moreover states the payment on the debt of C. Lair in the land transaction as having been $5,991 46. And the circumstance that the transaction was but one, and that the two debts were added, and the price of the land deducted from the aggregate is not deemed material since I. N. Lair's

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land paid much more than his own debt. And although it had been mortgaged to C. Lair to indemnify him as surety for this and the other debts of I. N. Lair, still it was as I. N. Lair's land, that it paid not only this debt of his, but other debts of C. Lair's to the extent of more than its value. There is, therefore, in our opinion, no ground for investigating in this case the usury contained in the debt of I. N. Lair, and the cross-error assigned on that subject is not available.

Damages may be awarded in some cases, where the collection of a note in suit, not a judgment is njoined.

One other subject remains to be disposed of. The complainants, by an amended bill, obtained an injunction to stay further proceedings in an action commenced by Broadwell on a note executed by C. Lair and another, until the matters involved in this suit should be heard, the ground of equity being that the claim of usury against Broadwell exceeded the amount of the note of C. Lair to him for $8,652 86, and that the excess should be set off against the other demand on which he was suing. The injunction granted by two Justices was modified by the Court so as to allow Broadwell to proceed to judgment on the note sued on, but with a stay of execution until further order of the Court. On final hearing, as it appeared that the usury did not exceed the note in which it was contained, the injunction was dissolved, but without damages, the omission to decree which is assigned for error. We think the damages should have been decreed. Although the original injunction did not enjoin a judgment but an action only, the modified order did enjoin the judgment allowed to be obtained. And as the alleged ground for the injunction did not in fact exist, there was no ground on the merits for refusing the damages usually awarded in such case.

Wherefore, the decree is reversed upon the errors assigned by the appellant, and the cause is remanded with directions to render a decree crediting the note for $8,652 86 mentioned in the bill by the sum of $5,527 69, and dissolving the injunction above mentioned with damages, and decreeing to the complainants their

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BROADWELL'S ADM'R. &c. vs LAIR &c.

costs except upon the amended bill praying said injunction.

Curry, Robinson and Johnson for appellants; *B. & A. Monroe, G. Davis and Trimble* for appellees.

JUDGE GRAHAM did not sit in the following cases, which should have been noticed at the page where the opinions are found:—*Rep.*

Commonwealth for Bell vs Hammond,	page	62
Bank of Kentucky vs Vanmeter	"	66
Jarvis & Trabue vs Quigley, &c.	"	104
Russell vs Petree, &c.	"	184

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DECISIONS

OF THE

COURT OF APPEALS

OF KENTUCKY.

SUMMER TERM---1850.

Drake *vs* Commonwealth.

ERROR TO THE WARREN CIRCUIT. *Case* 61.

Jurors. Practice. Evidence.

JUDGE SIMPSON delivered the opinion of the Court. *June* 4.

THE plaintiff in error was indicted for an assault and fined fifty dollars. The first assignment of error, is that the individual who acted as foreman of the grand-jury when the indictment was found, was also one of the jury that tried the case. There is, however, nothing to show that such was the fact, only that a person of the same name was upon both juries. This question was not made in the Court below, nor any exception taken to the juror upon this ground. They may have been different persons, or the juror may have been accepted without objection, although it was known to the plaintiff in error that he had been a member of the grand-jury. But whether or not, it istoo late to raise this objection for the first time in this Court.

That a petit juror is of the same name of one of the grand jurors, is not an exception which can be available in the Court of Appeals when not made in the Circuit Court.

Another assignment of error is, that the Court erred in permitting evidence to go before the jury of two different and distinct assaults, committed by the plaintiff in error, when there was but one charged in the indict-

If evidence be admitted of two assaults before the jury, without objection made, it will be no

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DRAKE to COMMONWE'LTH

cause for reversal in the Court of Appeals.

ment to have been committed by him. It is unnecessary to determine whether the evidence proved two distinct offences, or the mere continuation of one assault. It was not objected to at the time it was detailed by the witness, or at any time during the progress of the trial. If it were improper testimony, it was incumbent upon the plaintiff in error to have excepted to its admission, or to have moved its exclusion after it had been admitted. It was for the first time objected to, upon a motion for a new trial. It was then too late. All exceptions to it, if any existed, must be regarded as having been waived by the failure to present them in apt and proper time.

Upon the trial, the plaintiff in error offered evidence to prove his general good character and usual peaceable deportment as a citizen. This evidence was objected to, and the objection sustained by the Court. This decision of the Court is questioned by another assignment of error.

In prosecutions involving the character of the defendant he may give evidence of general good character.—A prosecution for an assault does not so involve character as to authorize proof on the part of the defendant of general good character. (3 *Starkie on Ev.* 365.

In cases of misdemeanors, unless the character of the defendant is involved in the charge, and put in jeopardy, evidence of his good character is not admissible: (3 *vol. Starkie on Evidence* 365.) The proceeding itself did not involve the character of the defendant. The testimony adduced to establish the assault, was direct and positive and not circumstantial. It was given by the person upon whom the assault was committed. Evidence impeaching the credibility of the witness might have weakened the force of his testimony and have rendered the guilt of the accused somewhat doubtful; but how this effect could have been produced by the evidence offered and rejected, so long as the direct and positive proof remained unimpeached and uncontradicted, it is difficult to perceive. The evidence offered was not admissible, and its rejection was therefore proper.

Wherefore, the judgment is affirmed.

W. L. Underwood for plaintiff; *J. Harlan, Attorney General* for Commonwealth.

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Burnham *vs* Best.

ASSUMPSIT.

ERROR TO THE MADISON CIRCUIT.

Case 62.

Assumpsit. Rent. Interest.

JUDGE SIMPSON delivered the opinion of the Court.

June 5.

Case stated.

THE heirs of James Best, five in number, being the owners of a tract of land and wishing to rent it, offered it publicly to the highest bidder for the term of one year, and Burnham, who had married one of the heirs, rented it for the sum of one hundred dollars. There was no written contract, or formal lease made by the parties.

After the expiration of the year, this action of assumpsit for use and occupation was instituted against Burnham, by the four other heirs, and a judgment obtained by them for four-fifths of the stipulated rent, and interest thereon, from the time the rent fell due.

To this judgment Burnham has prosecuted a writ of error; and it is contended on his behalf that the action for use and occupation could not be maintained, but it should have been brought, if maintainable at all, on the special contract; that the parties being co-heirs, no action at law will lie, but the remedy is in chancery; and that it was improper to give interest on the sum due, it being for rent, and therefore did not carry interest.

Where there is no formal lease, but only an express promise to pay a stipulated price for the use of land, assumpsit is maintainable.

If the correct doctrine be, that assumpsit for use and occupation will not lie where there has been an express formal lease, but debt is the proper remedy, still as there was no formal lease in this case, but a simple promise to pay a given sum for permission to occupy the land, assumpsit is maintainable.

But according to the very comprehensive and liberal operation allowed to the action of assumpsit in modern times, there seems to be no valid reason why it should be limited when brought for use and occupation, to cases where there had been no express promise or lease,

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BURNHAM vs BEST.

if the tenant had occupied the land, under a mere verbal agreement. Assumpsit can be brought for a breach of any other verbal contract, and why not for a breach of one stipulating for the payment of rent? The only reason why it would not lie at common law, was, that the rent savored of the realty, and debt was, therefore, held to be the appropriate action for its non-payment. As, however, in this country the action of assumpsit, has in nearly, if not in all cases, superceded the action of debt on contracts merely verbal, it should for the sake of consistency, there being no substantial reason to the contrary, be extended so as to embrace express verbal contracts for the payment of rent.

Where the term has been enjoyed and the rent payable in money, it may be recovered on the common count for use and occupation; tho' there was a special contract b'tween the parties.

And where the term has been enjoyed, and the rent is payable in money, and the day of payment has elapsed, a common count for use and occupation may be maintained, in analogy to other kindred cases, notwithstanding there was a special contract between the parties.

Where one of five heirs enjoyed land under a contract to pay rent to the co-heirs, they may maintain a joint action of assumpsit for four-fifths of the entire value of the rent.

The legal effect of the contract in this case is, that Burnham should pay four-fifths of the rent to the other heirs for the use and occupation of their part of the land. As Burnham could not contract with himself, the agreement must be regarded as having been made by him with the other four heirs, and as a promise merely to pay to them four-fifths of the sum bid, inasmuch as he was entitled to the other fifth in right of his wife. A contract of this kind is enforceable at law, notwithstanding an action of assumpsit cannot be maintained by one heir against his co-heir for rent, in the absence of an express agreement for its payment, but the remedy is by account or by bill in equity.

And as the contract was a joint one with the four heirs, the suit was properly brought jointly by them.

Interest may be recovered upon a sum certain due for rent as well as upon any other considera-

Although it was held in some old cases that interest should not be allowed upon rents, because it would be making profit on profit, yet the more modern and reasonable doctrine seems to be that a certain sum due for rent is similar to any other debt, and when due by verbal contract, interest shall be allowed or not according to circumstances. Here the whole case was submitted

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to the Judge, who occupying the place of the jury, in the exercise of that discretion, which it would have had, allowed interest on the rent due. In this, there was nothing improper or erroneous.

Wherefore, the judgment is affirmed.

Turner for plaintiff; *Caperton* for defendants.

Wood's Administrator, &c. *vs* Nelson's Executor, &c.

CHANCERY.

ERROR TO THE ESTILL CIRCUIT.

Case 63.

Executors and Administrators. Wills.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 7

The case stated.

THIS case comes up now upon a decree adjusting the accounts between the estate of James Woods, deceased, of which John Woods is administrator, and J. Nelson, who acted as executor under the supposed will of James Woods, which has been annulled, and who is now represented by Chambers, his executor; and also settling the accounts between said estate and Fielding Woods, &c.; also between said estate and the present administrator, J. Woods, and after decreeing payment of the balances in the two first accounts, distributing the estate of the decedent, James Woods, among his distributees.

J. Woods, the administrator and others, complainants with him in the original bill, assign errors in the decree upon each of these subjects, which will be presently noticed. The defendants in error plead in bar the affirmance of a former decree between the same parties, as reported in 9 *B. Monroe*, 600. But the defendants reply, and on inspection of the former opinion and record, it appears to be the fact that the matters finally disposed of by the decree now before us, were, by the former decree, referred to a commissioner under interlocutory orders, and were not involved in the affirmance. The plea, therefore, is no bar to the present writ of error.

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Wood's Adm'r. &c. *vs* Nelson's Ex'r. &c.

We proceed to notice the objections to the several branches of the present decree in the order in which they have been already mentioned, referring to the former opinion for a general statement of the facts and for the principles then settled.

An executor paid to one as a supposed legatee under a will which was subsequently vacated, in a settlement with the administrator he should be credited by the sum so paid where the supposed legatee was a creditor of the estate to that amount.

1. The present decree is erroneous in not charging Nelsons's estate with $700 instead of $625, on account of the two slaves sold by him under a clause of the supposed will. This item is explained in the former opinion, which intimates the propriety of charging the $700. The credit for $125 paid to F. Woods as his portion of the price of said slaves was properly given in the decree to Nelson's executor, because, although F. Woods was not entitled to it under the will as supposed, yet as he was a creditor of James Woods' estate, said sum should operate as a credit on his claim, and being thus available to that estate, should be credited to Nelson, the executor, who is charged with the entire sum of $700, and in fact with the whole estate that came to his hands.

An executor who holds funds of his supposed testator is bound for interest upon money in his hands to the administrator upon the will under which he had collected the funds, at least from the time of bill filed for an account, and no refunding bond is necessary. Such executor should be paid for his services so far as they were serviceable.

But we are of opinion that Nelson's estate should be charged with interest on the balance in his hands from the filing of the present bill, which was a very short time after the supposed will was set aside, and after administration was granted to J. Woods. At that time Nelson was no longer executor, and it was his duty to pay over to the administrator the assets remaining in his hands. And not being further responsible for debts if any, due by the estate, no refunding bond was necessary. As he will obtain credits for all proper payments, the balance against him constituted a fund due immediately to the lawful administrator. Such part of it as actually remained in his hands, he unjustly detained, though demanded by this suit, and for such part as was wrongfully paid over to the supposed devisees, together, with the interest thereon, he held an indemnity which has, in part, been decreed, including interest. Thus, upon a considerable portion of the fund, his estate makes interest by the decree, while it is charged with none.

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An executor of such an executor should not be paid for his services where the will was vacated and the first executor died during the pendency of the suit for vacation — tho' he may charge the estate of his testator.

We are also of opinion that Chambers, as executor of Nelson, is not entitled to charge the estate of Woods for his services as executor. His testator who died in the progress of this suit, was never a rightful executor, and at his death had no pretence of being so, but was simply the debtor of J. Woods' estate; and Chambers, as his executor, has no more right to charge that estate for his trouble in accounting or in paying over the assets, belonging to it, than to charge any other creditor or claimant for similar acts. His services, as executor, were rendered to the estate of his testator, Nelson, and are chargeable against it, not against the creditor.

Upon the question whether Nelson was entitled to commission or compensation for his services and expenses, the former decree directed, in substance, that so far as these were serviceable to the estate the allowance should be made, and this Court intimated its approbation of the principle; but the allowance not having been then made, its proper extent or measure was not finally determined. The principle is that as far as the acts of the temporary executor were useful and available to the estate, he should be compensated. So far as he collected and disbursed the fund for the benefit of the estate, and in a manner available to it, his services were as beneficial as those of a rightful executor would have been, and he is entitled to the usual compensation. The difficulty is in determining whether he is entitled to any, and if any, to what compensation with respect to that part of the fund which having come to his hand, has been retained or wrongfully paid out, and for which he is still liable. It would seem to be manifestly unjust to make the estate twice chargeable with full commissions on this large portion of the fund. If, upon the annulment of the will and the appointment of an administrator, Nelson had paid over this fund, as he should have done, it might have been just to have allowed him commissions for the collection, and to have allowed the administrator commissions for disbursing it. But as the fund has been withheld and is only to be obtained after a tedious litigation, there seems

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Wood's Adm'r. &c. vs Nelson's Ex'r. &c.

to be no ground for refusing to the administrator the full commissions usually allowed, both for collection and disbursement. And the estate, that is the distributees and creditors, if any, have received no advantage from the collection of this part of the fund by Nelson, but the doubtful one of reducing the claims against various individuals to a single demand against his own estate. He would seem, therefore, to be entitled to no commissions for collection, except to the extent that he has also made available disbursements, unless he has to a greater extent benefitted the estate by converting perishable property into money or debts, or by settling litigated claims against it, or by incurring some extraordinary expense or trouble advantageous to it. For which, if done, he might be entitled to an allowance. But we do not perceive that any thing of that kind has been done. This point, however, will be left open, as the case will be sent back for a restatement and further settlement of the accounts upon the principles above stated. And we only say at present, that as the case now appears, the allowance of $100 as commissions, seems to be more than twice as much as five per cent. upon the sum collected and availably disbursed would produce. This item is, therefore, deemed erroneous. The sum of $10, paid to counsel for advice in the management of the estate, was properly allowed.

The administrator of James Woods is entitled to a decree against the estate of Nelson for the balance which shall appear in favor of the former upon a statement and settlement of the account, introducing into the former statement by the commissioner the corrections above indicated, with interest on that balance from the filing of the original bill in this case. The result will be a considerable increase of the sum decreed in favor of the administrator of Woods against the executor of Nelson.

2. The account between Fielding Woods, &c., and the estate of James Wood allowing interest to the former, and applying the payments as credits at their date,

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is properly stated, except that Fielding Woods is not charged, as he should have been, with the sum of $125, paid to him as his portion of the price of the two slaves above referred to, of which he was supposed to have been entitled to one-fifth as devisee under the annulled will. This payment should be credited at its date so as to stop the interest upon so much of his claim against the estate of James Woods, and will of course greatly reduce it, if it does not extinguish the balance now appearing in favor of Fielding Woods.

We have not been able to find in the present record any ground for decreeing $173, or any other sum to Fielding Wood in addition to the balance reported in his favor by the commissioner, but will not decide absolutely against it, as the case is to go back for a re-statement of the accounts, and the Chancellor may point out some fact or principle requiring its allowance, which has escaped our notice. Should a balance be found against Fielding Woods upon a re-statement of the accounts, it should be ascertained in the decree, and either directed to be paid out of assets by the administrator of James Woods, or reserved for a settlement of that estate between his administrator and distributees.

3. As the fund which is or may be in the hands of the administrator for distribution will be considerably increased by correcting the errors above noticed in the decree before us, so much of that decree as fixes the sum to be distributed, is, of course, erroneous, and in fact that portion of the decree should fall with the previous portions on which it is based. The decree against the administrator is, moreover, erroneous in decreeing payments and distribution absolutely, as it seems to do, when the fund from which they should be made is not in his hands, but is nearly all of it in the hands of Nelson's executor. The decree for distribution may, on other grounds, have been premature. But we are not prepared to say that the Court was not or is not authorized by the pleadings to decree a settlement and distribution in this case, and upon the basis of the accounts to be corrected as herein indicated, unless it should ap-

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Woods' Adm'r. &c. vs Nelson's Ex'r. &c.

pear that the estate owes debts not brought into those accounts. But as the decree on this branch, as well as on the others, is to be reversed and remanded, we remark that we do not perceive the grounds on which the administrator is credited by $104 75 as the taxed costs of this suit, and by the further sum of $125 for his personal service and costs in this suit. And although the data for correcting these items, if they should be corrected, are not furnished by the present record, we are not to be understood as approving them. The allowance to the commissioner, though liberal, is not excessive, and should have been objected to in the Circuit Court, if deemed too high. With regard to the costs of this case in the Circuit Court, we understand that complainants and defendants in the original and cross-bills, so far as they relate to the matters referred to in this opinion, were left to pay their own costs, respectively. And although there might have been some ground for decreeing Nelson's estate and F. and S. Woods to pay a portion of the complainant's costs on the original bill, and such discrimination may yet be made; yet as the parties on all sides have been in the wrong, the complainants in the original and cross-bills in setting up and insisting on unjust demands, and the defendants in resisting and withholding just ones, we shall simply reverse the entire decree as between the representatives of Woods and the representatives of Nelson, and between them and Fielding Woods, &c., to be corrected as above directed, leaving to the Circuit Court the same discretion as to the costs which it had before the decree under revision was rendered.

Wherefore, the entire decree as between the parties just referred to, including the decree against Woods' administrator for payments and distribution, is reversed, and the cause remanded for a restatement of the accounts, and for a decree thereon according to the principles of this opinion. The plaintiffs in error are entitled to their costs in this Court, to be paid one-third by Fielding Woods, and the residue by the executor of Nelson.

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This reversal does not affect the decree in favor of Nelson's executor against Fielding Woods, Simpson Woods, Railsback, and the Vaughns, which is not complained of.

Turner for plaintiff; *Caperton* for defendant.

Childers *vs* Smith.

APPEAL FROM THE OWSLEY CIRCUIT.

DEBT.

Pleading. Rent. Reversion.

Case 64.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 6.

Case stated.

THIS action, by petition and summons, was brought in 1849 by Hardin Smith, as assignee of Abraham Smith, upon a note dated in 1840, for the payment of $200 five years after the date, and assigned by A. Smith, the payee, to Hardin Smith, the plaintiff, in 1846. The defendant demurred to the petition and filed five pleas, to each of which the plaintiff demurred. The demurrer to the petition was overruled, and the demurrer to the first and third pleas sustained. And the other pleas which were adjudged good having been traversed, the case upon the facts, as well as the law, was submitted to the Judge, who, after hearing the evidence, rendered a judgment in favor of the plaintiff for the amount of the note with interest, &c.

No objection having been made in this Court, to the petition, and none being perceived, and no bill of exceptions having been taken, the propriety of overruling the demurrers to the first and third pleas, presents the only matter which need be noticed by the Court.

These pleas aver that the note sued on was executed to Abraham Smith, as trustee for the plaintiff and for his use and benefit, in consideration of the rent (or as the third plea states, as the consideration *or rent*) of a farm leased by the defendant for the term of five years from the date of the note. The first plea further states that the farm was to be occupied by the defendant as

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tenant to and under the plaintiff, and that afterwards and before the expiration of said lease, the contract between the plaintiff and defendant was, by agreement between them, rescinded. The third plea states that after the making and before the expiration of the lease, and before said note became due, the plaintiff sold and conveyed his reversionary interest, in and to said farm, to a third person, who is named.

A plea averring that the note sued on was given for rent and that the contract of renting had been rescinded, without any averment that the note was by the contract of rescision to be surrendered, and that defendant had performed his part of the contract of rescision, held not good.

But looking now to the first plea alone, and assuming that the plaintiff was the absolute legal owner of the farm at the time referred to; that he leased it to the defendant for five years; that this lease was the sole consideration of the note; that it was executed to A. Smith solely for the use of the plaintiff and was subject to his control; and that before the expiration of the five years the contract between the plaintiff and defendant was rescinded; still it does not follow that this note, whether it was then in the hands of A. Smith or of the plaintiff, lost, as a matter of course, its legal obligation, so as to be no longer the proper foundation of an action. This would not be the case unless it were provided by the terms of rescision, or were its necessary consequence, that the note should be surrendered or cease to be obligatory, or unless in consequence of a rescision before the defendant had derived any benefit, or the plaintiff sustained any loss, from the contract, the consideration had wholly failed. And even if the terms of recision had provided for the surrender of the note, or stipulated that it should be no longer obligatory, and if the defendant had performed his part of the agreement of recision, it might be a question whether a parol agreement to that effect would have been available as a defence to an action on the note in the hands of the payee, or his assignee. But it is not necessary to determine that point, because the plea does not present it, and is, in our opinion, fatally defective in failing to show either that by the recision the consideration of the note had wholly failed, or that by the terms, or some specific operation of the recision, the note had ceased to be obligatory, and that the defendant had actually per-

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formed his part of the agreement of recision. The presumption would be that on rescinding the contract, every thing affecting the rights of the parties under the new condition, was provided for or actually effectuated, and that, consequently, the retention of the note, as an evidence of debt, (there being no receipt or defeasance,) was not inconsistent with the intent of the transaction. And the plea should have stated some fact repelling this presumption, or at least showing that under the actual circumstances, the legal and necessary effect of the recision was to terminate the obligation of the note.

Though the legal title to rent is generally incident to the reversion, it is not universally so—a grant of rent may be made out of the legal estate, leaving the reversion in the grantee.

The third plea relies upon the common law principle that the legal title to the rent is incident to the reversion and passes with it, unless expressly reserved in the grant. But this principle, though substantially true as stated, is not literally or universally so. For the rent, though an incident of the reversion, may be separated from it by a grant of the rent alone, in which case a subsequent grant of the reversion does not pass the rent. And if the $200 secured by this note is to be regarded as rent, and if the five years lease for which it was to be paid, was carved out of the present legal interest and estate of the plaintiff, leaving the immediate reversion in him, then as the execution of the note for this rent to a third person, certainly vested in him the legal title to the rent, (at least as far as secured by the note,) it seems necessarily to follow that the legal title to the rent and to the reversion, being thus in different persons, and, therefore, actually separated, the former was no longer an incident to the latter, and did not and could not pass by a subsequent grant of the reversion. Nor is this consequence, in our opinion, affected by the fact that the third person held the legal title to the rent in trust for the use and benefit of the same person who held the reversion in the land. The common law looked to the legal title alone, and when the legal title to the reversion and to the rent were in different persons, one of whom also held the equity in one of the subjects, it no more annexed the legal title of one person to the rent as an incident to the legal title of another to the

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CHILDERS vs SMITH.

reversion, because the latter was also equitably entitled to the rent; than it annexed the legal title to the rent as an incident to the equitable title to the reversion in the same person. It did not regard the equity in either case, but the legal title alone; and the legal title to the two subjects being in different persons, either might transfer his legal title, or interest, without affecting or being affected by that of the other. The plea, therefore, does not present a case to which the principle relied on applies, or rather it presents a case to which the principle does not apply.

But the plea fails in other very important particulars to make a case within the principle. It does not show the nature of the defendant's reversionary interest, whether legal or equitable; nor does it show that he held and conveyed the immediate reversion after the expiration of the term of five years. It does not even state that the lease was made by or for him, or that it was carved out of his interest. And there is no necessary or certain implication as to any of these facts growing out of the statement that the note was made payable to A. Smith, in trust for his use and benefit. And even if he were the absolute owner of the land, and the lease was made by or for him, it does not appear that any rent was reserved in the lease itself; and no reason being stated for making the note for the rent payable to another, the presumption arises that the separation of the title to the rent from the title to the land or the reversion, was the very object of putting the transaction in the form actually given to it. Then this gross sum, payable at the end of five years, and secured not by the lease, but by a separate specialty, payable to a third person, seems hardly to come up to the common law definition of rent, to which the principle referred to applies. But independently of this last suggestion, it would certainly be very strange if the legal title to this note, or the sum secured by it, should have been divested out of the payer by the transfer of another person's interest, whether legal or equitable in the land, for the lease of which for a certain term this

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note was given. Whatever then might have been the case, had the legal title to the note been in the defendant as payee or assignee, when he conveyed the reversion, (and even then we should have had great doubts whether he would have been, *ipso facto*, divested of it,) we are clearly of opinion, for the reasons before stated, that the grant of the reversion did not, under the circumstances appearing in this plea, either transfer to the grantee the legal title to the note and the right of action upon it, or in any manner divest the payee or his subsequent assignee of this right and title. Any equitable claim which the grantee of the reversion might have had to the sum secured by the note, or to any part of it, was obviously of no concern to the defendant, or at least was wholly unavailable to him as a defence, either legal or equitable, to this action, unless such claim had been satisfied by him, or at least asserted against him, of which there is no suggestion.

Wherefore, the judgment is affirmed.

Burnes for appellant; *Barnes & Noland* for appellee.

Noland *vs* Clark.

CASE.

ERROR TO THE ESTILL CIRCUIT.

Case 65.

Agents. Collateral security.

JUDGE GRAHAM delivered the opinion of the Court.

June 8.

Case stated. 10bm289 118 88

PARK and Clark were parties in the purchase of hogs for foreign market. In the year 1840, having sold hogs in Georgia on credit, they deposited with Dansforth notes of the purchasers to the amount of $2,687 33¼ and took his receipt therefor, dated 28th December, 1840, which reads as follows: "Received from Park & Clark the following notes for collection, which, when collected, *I am to forward to Kentucky in a check on the Northern Bank of Kentucky*," and after giving a list of the notes, says, "all of which I pronounce good, and (think) most of them will be paid at maturity.

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NOLAND vs CLARK.

Park & Clark being indebted to several persons in this State, did on the 19th May, 1841, assign Dansforth's receipt to McMonigle for the use and benefit of himself and five other persons named in the assighment, "to be apportioned by him to the payment of the notes due them for hogs," &c.

Dansforth remitted money, from time to time, until he had paid about thirteen hundred dollars. The proof shows very clearly, that at the time of the date of his receipt to Park & Clark, he was embarrassed in his pecuniary circumstances, and if he had then been pressed by his creditors, would have failed. About May 1841, his condition could no longer be concealed, and shortly afterwards, he became insolvent. It seems from his deposition, which has been taken in this cause, that he collected the whole amount of the notes left in his hands, except a debt due from himself for $200, and a debt due from Burdett, which, in the list, is stated at $236 75. Burdett had also failed, and was insolvent. McMonigle had in the meantime died.. It is very clearly shown by the proof of Toombs and others, that if suit had been brought on Dansforth's receipt at the time it was assigned to McMonigle, or at any time afterwards, not one cent could have been made by coercive legal process. On the other hand, it appears very probable, from the statements of Dansforth himself and other witnesses, that had personal and direct application been made at his residence in Georgia, between the dates of May and August 1841, he would have paid the whole, or the greater part of the balance due on the receipt, but not in par money. He however continued to pay as his creditors applied, until all his means were exhausted.

This suit has been instituted by Park & Clark, and now presented by the latter as survivor, with the view of making McMonigle and those for whose use the receipt was transferred, responsible for the residue of the amount left in Dansforths hands, and which he has failed to pay over. Their supposed liability is based on the fact that McMonigle did not, nor did either of the oth-

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ers visit Georgia, and there, by process of law, or direct personal application to Dansforth, attempt to collect the amount due from him, which as already intimated, the complainants charge could have been done; and finally that the defendants are responsible, because they did not use that diligence which the circumstances of the case required of them.

It is said that a person who receives bonds and notes as collateral security for a debt, is bound to use due dilgence, and if they are afterwards lost, through his negligence, by the insolvency of the makers, he is chargeable with the amount. This rule of law we suppose not to be applicable to the facts in this case. Here no bonds or notes were placed in the hands of McMonigle, but only the receipt of a man living in a distant State, and in whose integrity and fidelity, Park & Clark fully trusted. At the time this receipt was assigned, McMonigle was known to be in feeble health, and in fact laboring under a fatal disease, of which he afterwards died; that at the time he received the receipt he was physically unable to have travelled to Georgia. The receipt of Dansforth shows upon its face that it was not expected that any one would be at the trouble and expense of a tedious journey to receive the money from him. His undertaking was to transmit the money when collected to Kentucky. Clark certainly expected the agency to be carried on by written communication. He undertook to apprise Dansforth of the assignment to McMonigle. This promise he seems not to have complied with until August 1841, about which time Dansforth became almost, if not entirely hopelessly insolvent. Clark's letters of that date and his several subsequent letters up to as late a date as January 1842, all show not only that he expected a transmission by check from Dansforth, but that he regarded it as his duty to aid by epistolary correspondence in the collection of the demands. The testimony of one or two of the witnesses, is at least very persuasive that this mode of collection was the only one con-

Though generally one who receives bonds and notes for collection as collateral security is bound to use reasonable diligence to collect, and if they are lost by neglect he is chargeable. This rule does not apply to a case where the receipt of a lawyer in another state for notes to collect is transferred as collateral security especially as the person receiving the receipt was in feeble health, and the lawyer bound by his receipt to transmit as collected. It could not be expected that he would go to a distant state to pursue the lawyer.

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NOLAND vs CLARK.

templated by the parties at the time of the assignment in May 1841.

The case of *Barrow, assignee of Prior*, vs *Rhinelander*, (3 *J. C. R.* 615,) which is referred to by the Circuit Judge as sustaining his opinion, is certainly very essentially different from the present. In that case "the defendant was the confidential clerk of the merchant, and had free access to all his papers and money.' From the beginning almost of their connection, Prior was embarrassed and had recourse to the defendant for moneys. This created at once a delicate relation between them; and the rapidity with which loans and debts were accumulated, securities exacted, the load of dependency increased, and blind and necesitous submission yielded, is distressing to learn even as told in defendant's answer:" (1 *J. C. R.* 556.) In that case, it was also clearly proved, that in addition to the bonds and notes assigned to the clerk, other notes were taken by him from the merchant's possession without his knowledge or consent. It was very properly determined by the Chancellor, (3 *Johnson's Ch. Rep.* 620,) "that by the fraudulent conduct of the defendant, he made himself justly chargeable with the amount of the notes, or at least for so much of them as were lost from want of prosecution in due season, because instead of exercising a reasonable and equitable discretion in the collection of the notes, his conduct was perverse and unconscientious, tyranical, oppressive, and unjust: (*S. C.* 622.)

It hardly need not be said that no such facts exist in this case. On the contrary, the parties sought to be charged, seem to have acted throughout in good faith. Taking into consideration all the circumstances and facts developed in this case, we are of opinion, that neither McMonigle, or either of the others, was under any obligation of duty to go to Georgia, that neither of them have been guilty of gross neglect; that the debts have not been lost through their inattention, and that, therefore, the complainants were not entitled to a decree.

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The decree of the Circuit Court is therefore reversed, and the cause is remanded to that Court with directions to dismiss the complainant's bill with costs.

Turner and Noland for plaintiffs; *Caperton* for defendants.

Crook's Executor *vs* Turpin. Thomas *vs* Same.

CHANCERY.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 66.

Husband and wife. Settlements. Bankruptcies.

JUDGE SIMPSON delivered the opinion of the Court.

June 10.

THE contest in this case is between the assignee of the husband, for a valuable consideration, and the wife, about a fund that belonged to the latter, and was in the hands of her guardian.

Case stated.

The husband and wife had instituted a suit in Chancery against the guardian for a settlement of his accounts and a payment of the money in his hands to them. During the pendency of that suit, a creditor of the husband commenced a separate suit in Chancery for the purpose of subjecting the fund to the payment of his debt, on the ground of the insolvency of the husband, as established by a judgment at law and a return of no property found, upon an execution that issued thereon.

Upon the petition of the wife, she was made a defendant to the latter suit, and by an answer and cross-bill against the creditor and guardian, asserted an equity to the fund, as part of her estate in the hands of her guardian.

Previous to the institution of this suit by the creditor, the husband had for a valuable consideration assigned the fund in contest to another person.

A decree was rendered in the first suit by which the amount due by the guardian to the wife was ascertain-

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CROOK'S EX'R. vs TURPIN. THOMAS vs SAME.

ed, and its payment ordered to be made to the husband and wife jointly.

After this decree was rendered the guardian died, and the creditor in the suit which he had instituted, filed a bill of revivor against his executor. The executor then filed an answer and cross-bill against all the parties claiming the fund, for the purpose of having their respective rights to it decided, and alleged that he had by the consent of the creditor, paid the money over to the husband's assignee, believing that he was entitled to it, with the understanding, however, that it should be repaid to him if the right of the wife prevailed. He also alleged that the husband had, during the pendency of the suit, become a bankrupt and obtained a certificate of discharge as such, which he exhibited.

Decree of the Circuit Court.

The Court below rendered a decree in favor of the wife, and also in favor of the executor for the money he had paid over to the assignee. To that decree both the executor and assignee have prosecuted writs of error.

Various objections are made to the proceedings on the ground of irregularity, but as the merits of the controversy depend upon the question whether, the assignment by the husband deprived the wife of her equity to a settlement, that will be first considered.

Assignees in bankruptcy, and the assignees of the husband of the wife's chosen in action, & equitable interests, take them subject to the equity of the wife to a settlement. (*Roper on Husb. and Wife, vol.* 1, 263, 273; *Clancy on Married Women*, 494 *to* 510; 2 *Story's Eq.* 638.)

It has been long the settled equitable doctrine that assignees in bankruptcy, or insolvency, of the husband, and also his general assignees for the payment of debts due to his creditor's generally, take the wife's choses in action and equitable interests assigned to them, subject to her equity to a settlement. It was at one time doubted whether a special assignee or purchaser from the husband, for a valuable consideration, took them also subject to the wife's equity. But it is now firmly established that he does, and that her equity is superior to the right of the assignee. (*Roper on Husband and Wife, vol.* 1, 263 273; *Clancy on Married Women*, 494 *to* 510; 2 *Storey's Equity*, 638.)

It is, however, contended that the decree directing the payment of the money to the husband and wife, ex-

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tinguished the wife's right of survivorship to it, and consequently deprived her of her equity to a settlement. It is not admitted that a decree obtained in right of the wife, ordering the payment of the amount decreed, to be made to her and her husband jointly, will have the effect ascribed to it. But it is not on this occasion deemed necessary to decide that question. The loss of the wife's right of survivorship, does not necessarily deprive her of her equity to a settlement. The latter right exists, in her equitable interests, until the husband or his assignee actually obtains the possession of the money or the property: (*Clancy on the Rights of Married Women*, 441; 2 *Dana*, 437.) Besides, the wife had in this case, filed her cross-bill, claiming the fund in the hands of the guardian, before the decree was rendered in the other case, and the form of that decree could not prejudice her right.

The right of the wife to a settlement exists until the husband or his assignee actually obtains possession of the money or property. (*Clancy* 441, 2 *Dana* 437.)

Nor did the payment made to the assignee, by the executor of the guardian, affect the equity of the wife. The fund in the hands of the guardian was under the direction and control of a Court of Equity, and the payment having been made after the suit had been commenced by the wife, was unauthorized and must be disregarded: (*Macauley* vs *Philips*, 4 *Ves.* 18.)

The payment of a fund to the assignee of the husband, out of which the wife has an equity to a settlement pending a litigation for that object, will not affect the right of the wife. (4 *Vesy* 48.)

It is urged, however, that no suit was pending at the time the payment was made, the guardian having previously died, and the wife not having filed a bill of revivor.

The suit, however, was still pending, no order of Court had been entered abating it; and a bill of revivor had been in fact filed by the wife, and endorsed by the Clerk as having been filed in Court, although not entered on the order book. Under these circumstances, the payment must be regarded as having been made wrongfully, and it cannot prejudice in any degree the wife's equity.

Though a party to a suit in chancery die, it is still a pending suit until an abatement be entered.

The regularity of the decree is objected to, because the bill of revivor by the wife was not noted on the order book, and because no process was served on the executor. As no application is required to be made to

No leave is necessary to be had of the Court to file a bill of revivor—it is matter of right.—Is

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CROOK'S EX'R. vs TURPIN. THOMAS vs SAME.

the Court for leave to file a bill of revivor, but a party has a right to file a bill for that purpose whenever it is necessary to do so, it may be questionable whether the failure to enter it on the order book, as filed, would constitute an available objection to the regularity of the proceedings; but the point is deemed immaterial and is not now decided. The executor having appeared and filed his answer and cross-bill, in which the claims of all the parties were noticed, and presented to the Court for adjudication, which cross-bill was answered by the wife, the object of a bill of revivor and the execution of process thereon had been virtually attained, and as the parties were all before the Court, and their rights set forth and asserted in the pleadings in the cause, there existed no good reason why they should not have been passed upon and settled by the Court.

it necessary to notice it upon the record at all? *Quere.*

Another objection to the decree is, that it directs the payment of the money to be made by the executor, without first having dissolved the injunction that the creditor had obtained in the same suit against the payment of the money by the guardian. Although the decree did not formally dissolve the injunction, yet it did, in effect do so, by directing the payment of the money in opposition to the restraining order, and, therefore, no formal dissolution of the injunction was necessary. But it is said that there are two decrees for the same money in different suits—one directing the payment to be made to the husband and wife, and the other directing it to be made for the benefit of the wife alone. This, however, creates no difficulty and forms no objection to the decree. The payment of the last will discharge both, and exonerate the executor from further liability on either.

A decree for the payment of money which has been injoined in the hands of a party to the suit, is in effect a dissolution of an injunction, and giving direction to the fund.

So far, however, as the executor is concerned, the decree is erroneous in not ordering the money to be paid by him out of the assets in his hands. For this error, that part of the decree will have to be reversed. But as it is an error that might have been corrested by application to the Court below, the reversal on that

The Circuit Court may correct clerical errors after the expiration of the term, a decree in personam against executors where it

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ground alone will not, according to the present practice, entitle him to his costs in this Court.

Wherefore, there being no error to the prejudice of Thomas, the assignee, the decree is affirmed upon his writ of error; and as to the executor it is reversed, with directions to change the decree, so as to make the sum decreed payable by him out of the assets in his hands; and upon his writ of error, the parties must each pay their own costs.

should have been out of assets, is such an error. —And costs will not be adjudged to plaintiff in error or appellant where that is the only error, unless application has been made to the Court below.

Apperson for plaintiffs; *Peters, J. & W. L. Harlan and Daniel* for defendants.

Brown's Administrator *vs* Brown.

DEBT.

ERROR TO THE GARRARD CIRCUIT.

Case 67.

Profert. Administrator's jurisdiction. Instalments.

JUDGE GRAHAM delivered the opinion of the Court.

June 12.

THIS is an action of debt instituted on a note (executed by defendant) which reads as follows: "I promise to pay Arabia Brown one hundred and fifty dollars without interest, to-wit, fifty dollars within ten days, and the balance in two annual instalments. Given under my hand this 10th day of March, 1843." The obligee having died, this suit was, in 1849, brought by the administrator of his estate.

The case stated.

The declaration is in the debit and detinet, and "of a plea that the defendant render to the plaintiff $150."

The Circuit Court sustained a demurrer to the declaration, and dismissed the suit for want of jurisdiction. The plaintiff does not make profert of his letters of administration. That a declaration in debt in action by adminis trator should be in the detinet only and not in *debet et detinet*, and that profert should be made of letters of administration, are technical objections which, however fatal formerly, are now not available (3 *Monroe*, 224; 5 *Ib.*, 390.)

Formerly a suit by an administrator in the *debit* and *detinet* could not be maintained. And profert of letters of administration were necessary. It is not so under modern practice. (3 *Mon.* 224; 5 *Ib.* 390.)

The main question is whether the Circuit Court had

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BROWN'S ADM'R. *vs* BROWN.

Debt may be maintained in the Circuit Court upon an obligation to pay a sum of money by instalments, all the instalments being due, though some of the instalments be less than $50. (*Burn on actions at Law*, 351; *Harlton on bonds* 123.)

jurisdiction of the cause of action. The note is dated in 1843, and the suit commenced in 1849. It is not an obligation to pay several sums on several days, but it is an obligation for a debt payable by instalments. All the instalments are due. The action of debt is, therefore sustainable for the entire sum: (*Burn on Actions at Law*, 351; *Harlstone on Bonds*, 123.) There would not, as contended in argument, be three separate judgments for fifty dollars each, but the judgment should be for the entire sum; and if the debt bear interest, then that interest go on so much from such a date, and so much from another date, &c.

The fact that the note is credited by $100 paid in 1848, it seems to us does not reduce the amount then due to fifty dollars. It is difficult to imagine why the contracting parties should have inserted the words "without interest," when, as a matter of law, the debt would not bear interest until the day of payment had arrived; but whether they had any reason or motive for the insertion of that clause, does not appear. The law gives interest from the day of payment, unless there be a stipulation to the contrary. We suppose that the expression used in this instrument cannot have that effect. It is at most but an agreement that fifty dollars, without interest, is to be paid ten days after date, and fifty dollars, without interest, at each of the subsequent periods of payment; but after such days of payment transpire, there is nothing in the writing to prevent the usual operation of law, which gives interest upon the sum due. It seems to us that the Court had jurisdiction of the cause of action, and that the demurrer to the declaration ought not to have been sustained.

The judgment of the Circuit Court is, therefore, reversed, and cause remanded with directions to set aside the judgment and overrule the demurrer, and for other proceedings not inconsistent with this opinion.

Harrison for plaintiff; *Burton & Dunlap* for defendant.

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Commonwealth for Reynolds *vs* Kinnaird.

COVENANT.

Case 68.

ERROR TO THE GARRARD CIRCUIT.

Guardian bonds. Prochein amic.

JUDGE GRAHAM delivered the opinion of the Court.

June 12.

Case stated.

THIS action upon a joint and several bond executed by a guardian and his sureities, is brought against one only for an alleged failure of the guardian to discharge his duties as such. The ward being yet a minor, the action is prosecuted by Seymore Hopper, as his next friend. The defendant plead that Seymore Hopper, the next friend, is the same man who, by that name, is an obligor in the bond as one of the sureties of the guardian. The Court overruled the demurrer to this plea, and having rendered judgment in bar of plaintiff's action, the case is brought to this Court. The only question, therefore, is whether the plaintiff's action can be defeated by reason of the fact that the relator's *prochein amie*, is also one of the sureties of the guardian? The suit, although in the name of the Commonwealth, and prosecuted by "a next friend," is in truth for the sole and exclusive benefit of the ward; the judgment, if one be had, is for his benefit, and the money due from the guardian will be, when collected, his money. His next friend has no manner of interest in it. It is true he may be bound for the costs of the suit; but that fact cannot operate to the prejudice of the ward, nor can we perceive any reason why it should prevent him from acting as the next friend of the infant. As one of the co-securities he may, in certain contingencies, be liable to contribute to Kinnaird a portion of the sum the latter may be compelled to pay; but that will be a matter between themselves not at all affecting the ward, for he cannot have any interest in it.

In a suit against one of several obligors in a guardian's bond, it is no ground of defence that another of the obligors is the next friend of the infant for whose benefit the suit is bro't.

It seems to us that the plea presented no bar to the plaintiff's action, and the demurrer ought to have been sustained.

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CARTER vs STENNET & EASON.

The judgment of the Circuit Court is, therefore reversed, and the cause remanded with directions to set aside the judgment and sustain the demurrer to the plea, and for other and further proceedings not inconsistent with this opinion.

Lusk & Harrison for plaintiff; *J. & W. L. Harlan* for defendant.

CHANCERY.

Case 69.

Carter *vs* Stennet and Eason.

ERROR TO THE GARRARD CIRCUIT.

Set-off. Bills of Review. Damages.

June 12.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

STENNETT, as the assignee of Eason, having obtained a judgment against Carter upon a note given in payment for a small drove of horses, Carter filed his bill and obtained an injunction upon the allegation that a fraud had been practised on him by Eason as to one of the horses which had been sent to the south for sale, and had become blind, &c.; and also on the allegation of a small payment to Eason and two small demands against him, for which credits were claimed on the ground that they accrued before the assignment; that the assignment was ante-dated, and was fraudulently made to hinder and defraud Eason's creditors, and that Eason was a non-resident and insolvent. A general traverse was filed for Eason, who was proceeded against as a non-resident, and the material allegations of the bill were specifically denied by Stennett in an answer which, though filed with the papers and made the ground of a motion to dissolve the injunction and noticed also in the decree, was not regularly noted on the record as being filed.

Decree of the Circuit Court & bill of review and second in-

On the hearing of this case, the injunction was perpetuated as to the sum of $15 and dissolved with damages as to the residue of the sum enjoined. And at the succeding term of the Court, Carter filed a bill of review, which setting up substantially the same matters which

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had been presented in the original bill, and referring to the proceedings in that bill, prays for a review, &c., on the ground that the exhibits referred to in the original bill and filed therewith to prove the payment, and demands for which credits were claimed, and which were believed to have been on file when the case was heard and to have been used on the trial, were in fact lost, or withdrawn without the fault of the complainant, and were not considered by the Judge in making up the decree, and that this was not discovered by the complainant or his counsel until after the decree was rendered; when the time being near its close, a petition for a re-hearing was not filed because of the press of business, and because the complainant was not apprised of the necessity of such a petition, and the bill prays for an allowance of the credits claimed in the original bill. A second injunction was obtained on this bill; and Eason and Stennett having filed their answers denying the material allegations, and relying on the former decree, and the insufficiency of the grounds alleged for opening it, the Court on the hearing dissolved the injunction without damages, and dismissed the bill with costs. To each of these decrees (which are contained in the same record) Carter prosecutes a separate writ of error, and the defendants file cross-errors in each case.

Injunction had and dissolved.

Taking up the decree on the bill of review, as first to be disposed of, the preliminary question in that case is, whether it presents a sufficient ground for opening and reviewing the former decree. If it does not, then even if the proof made on the bill of review were sufficient to establish the grounds of relief set up in the original bill, it would be of no avail, because the original decree is conclusive between the parties while it remains in force, and must preclude further litigation and adjudication on the same facts, unless cause be made out for opening the decree and renewing the contest. In this preliminary point, the complainant has wholly failed. For, although it appears that the exhibits referred to were with the papers at the hearing, and that their loss

Tho' the proof adduced on a bill of review may be such as to authorize the relief prayed for, yet if there are not good grounds shown for filing the bill of review no relief can be granted. The former decree is a bar.

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CARTER vs STEWART & EASON.

was not discovered until after the decree was rendered; and although it were conceded that if they had gone before the Judge as a part of the case, his decree might and should have been more favorable to the complainant, and that their loss, if not discovered until after the close of the term would have been a sufficient ground for opening the decree and allowing new proof; still as the loss was in fact discovered before the end of the term and in time for a petition for re-hearing, the whole question would turn upon the sufficiency of the excuse for not filing a petition for re-hearing. The press of business before the Court, did not prevent the filing of a petition, nor is it shown, or even alleged that the complainant's counsel was too much engaged to have filed a petition, or made a suggestion, which might have suspended the decree; and the ignorance of the complainant himself of the necessity of taking a particular step in Court, might, if deemed sufficient always furnish a ready excuse for the want of vigilance and attention. And often a sufficient ground for setting aside an unfavorable decree. The stability of decrees and other judicial proceedings, so necessary to the repose and security of society, would be too much weakened by the allowance of such an excuse, as the ground of a bill of review, which, when founded upon an alleged discovery and intended to open the case for new proof upon issues already decided, must show no want of reasonable diligence, either by the party himself, or by his counsel whom he has chosen to represent and act for him. The party himself may not in fact have been apprised of the rendition of the decree until after the expiration of the term, but being represented by counsel in Court, his want of such knowledge is, by itself, entirely unavailing.

The discovery during the term that a part of the exhibits had been lost out of the papers, and that the decree had therefore been

There is, therefore, no ground for letting in new proof under the bill of review. And as that bill does not assign any error of law, on the face of the decree, there is no further question in that case, as there was no ground of relief, and the bill was necessarily dismissed. We observe, however, that there does not seem to have

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been any new proof applicable to the credits claimed on the exhibits referred to in the original bill, except such as is furnished by the answer of Eason to the bill, except such as is furnished by the answer of Eason to the bill of review. And even if that answer be taken as evidence against Stennett, on the ground of his reference to it, it does not admit that the transactions on which the credits are claimed preceded the assignment, but avers the contrary to be the fact. And, therefore, would not authorize the application of the credits to the demand in the hands of Stennett, unless the assignment itself was fraudulent as alleged, but which is not satisfactorily established. There was, therefore, no error in dismissing the bill of review and dissolving the second injunction.

against the party who had filed them, should have been made known by petition for a rehearing, or a request to the Court to suspend the decree to give time to file petition for rehearing. It was no ground for bill of review after the adjournment of Court that the *party himself* was ignorant of his rights and duties in the premises.

In the original case, it is assigned for error that the full value of the blind horse should have been allowed as a credit on the judgment; and that the other credits claimed in the bill should have been allowed, because the answer of Stennett, though lodged with the Clerk, had never been filed of record; and the allegation of the bill should, therefore, have been taken for confessed. But when, as in the present case, it sufficiently appears that the answer, though not formally noted of record, has been filed with the papers in proper time, that this was known to the complainant, and that the Court and the parties have treated it as a part of the case, it has been the practice of this Court to regard it in the same light, and to give it the same effect as if it had been regularly filed of record. Then the allegations of the bill were not only denied by this answer of Stennett, which required proof upon every point, but there was also a traverse filed for Eason which put in issue every material allegation adverse to his interest.

Where an answer has been lodged with the Clerk in proper time and known to complainant, though not formally noted on the record as filed, but treated by the Court and parties as part of the record, this Court will so treat it and give it the same weight as if regularly filed of record.

Under this state of the pleadings, it is a sufficient answer to the first error assigned, to state that, although the bill alleges that the horse sold for less than the cost of taking him to market, and was of no value, the proof shows that he was sold for considerably more than alleged, and that $15 allowed as a credit was about com-

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CARTER vs STENNETT & EASON.

mensurate with the actual loss. And, as to the other credits claimed, there being neither vouchers nor proof in the record to sustain them, they were properly rejected. And even if they had been proved, still, as there is no sufficient proof that the assignment to Stennett was fraudulent, and no proof that it was ante-dated, these credits accruing against Eason after the date of the assignment, could not have been allowed against the assignee. There is, therefore, no ground for reversing the original decree upon Carter's writ of error.

Where a horse was purchased for a foreign market to which he was taken and sold, no return or offer to return was necessary where the unsoundness was discovered in a distant State.

Upon the cross-errors, we remark first, that the horse having been purchased for a foreign market, to which he was taken and sold, it was not requisite that there should have been a return, or an offer to return him, when, in a distant State, his unsoundness was discovered. The complainant did not lose his rights in equity by disposing of him there to the best advantage. And although this horse was sold to the complainant, with others, for a gross sum, yet there seems to have been a specific, or at least an average price put upon him, which enabled the Court to ascertain, with reasonable certainty, the loss sustained. The insolvency and non-residency of Eason, are sufficiently established, if that were necessary to authorize the damages growing out of the original transaction and consideration of the note, to be credited upon it in the hands of his assignee. There was no error, therefore, in not dismissing the original bill without any relief to the complainant.

Where a second injunction is obtained injoining a judgment at law upon filing a bill of review which was not warranted by the rules of chancery practice, damages are due and should be awarded to the defendant.

Upon the question made by the second cross-error, as to the failure to decree damages on the dismissal of the bill of review and the dissolution of the second injunction, we have been unable to perceive any sufficient ground for refusing the damages directed by statute to be paid on dissolution of an injunction and must consider the failure to decree them in this case as an error to the prejudice of Stennett.

Wherefore, the original decree is affirmed upon the original and cross-errors assigned upon it; and the decree upon the bill of review is affirmed upon the errors assigned by Carter on his writ of error, but is re-

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versed upon the cross-error last noticed, and the cause upon that claim is remanded, with directions to render a decree in favor of Stennett against Carter, as before; and also for ten per centum damages upon the sum enjoined. The costs in this Court must be paid by Carter.

Burton for plaintiff; *Dunlap* for defendants.

Moore *vs* Foster.

DEBT.

ERROR TO THE KENTON CIRCUIT.

Case 70.

Ferries. Slaves. New trial.

JUDGE SIMPSON delivered the opinion of the Court.

June 12.

Case stated.

MOORE brought an action of debt on the statute of 1831, (1 *vol. Stat. Law*, 715,) against Foster, who was the owner and keeper of a ferry across the Ohio river, for the penalty imposed on him as such, by the act, for conveying over said river a slave, the property of the plaintiff.

The keeper of a ferry is authorized by the statute, to take a slave across the river in the presence and company of the owner, or at his request. Whether a person who hires a slave, and has him in his employment at the time, can according to the true meaning and construction of the statute be denominated the owner, and authorize the keeper of a ferry to convey him acrosss the Ohio river, is the main question presented in this case.

The hirer of a slave is in legal contemplation the owner for the time that he has him hired. So far as the interest of the absolute owner may be affected, he has no authority to do any act which would operate to his prejudice or the violation of his rights. But as the owner invests the hirer with the right of commanding the services, and he is not only apparently, but really the owner of the slave for the time being, by virtue of the contract of hiring, his presence and direction to do so, must be regarded as sufficient under the statute to

The hirer of a slave is in legal contemplation the owner of the slave for the time that he has hired him, so far as to control the action of the slave, and may give assent to his crossing the Ohio, which will be a protection to ferry keepers under the statute.

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MOORE vs FOSTER.

authorize the owner of a ferry to transfer the slave across the river.

This construction is sanctioned by the consideration that the act is highly penal in its provisions, not only imposing a penalty upon the owner of the ferry, and making him responsible for the value of the slave, but also subjecting him to a forefeiture of his ferry franchise, and rendering him unable to be the grantee of the same right at any future period. In view of the penal character of the statute, a construction requiring him to distinguish between the owner of the absolute property in the slave, and the owner for a limited time by a contract of hiring, and to regard the presence of the former, but not of the latter, as a sufficient authority, would be unnecessarily harsh and rigorous.

Such consent given by the hirer would render him liable to the owner in case of the escape of the slave.

If the hirer should convey the slave across the Ohio river, without any authority from the owner, he would no doubt render himself liable to the latter for any injury he might sustain by the unauthorized act. This liability of the hirer, the owner of the slave must rely upon for his indemnity, as the keeper of a ferry, in our opinion, does not incur the penalties of the statute, when the hirer authorizes him to take the slave across the river.

The same exposition of the statute was given by the Court below in its instructions to the jury, and consequently, if the testimony authorized the verdict of the jury in favor of the defendant, there is no error in the judgment.

Tho' the verdict of the jury may be against the weight of the evidence, if it be not flagrantly so no new trial can be granted for that cause.

Although we are inclined to the opinion that the verdict of the jury was against the weight of evidence, yet it is not so flagrantly wrong as to authorize this Court to disturb it, in opposition to the decision of the Court below sustaining it, upon a motion for a new trial.

Wherefore, the judgment is affirmed.

B. & A. Monroe and Benton for plaintiff.

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Jarboe *vs* Smith.

COVENANT.

APPEAL FROM THE WASHINGTON CIRCUIT.

Case 71.

Merger. Practice at Law. Dismissals of suit by agreement.

JUDGE SIMPSON delivered the opinion of the Court.

June 13.

Case stated.

IN this action of covenant, the defendant pleaded that before the commencement of the suit, the plaintiff had instituted a suit against him, upon the same writing, for the same causes of action, in the same Court, and by the agreement of the parties, that previous suit had been by the judgment of the Court, *dismissed agreed*. He therefore plead and relied upon that order of dismissal as a bar to the present action.

The plaintiff replied that the dismissal referred to in the plea, had been made in pursuance of a written agreement of the parties, by which it was agreed by them, that the suit should be dismissed, and all matters of controversy between the parties, involved and arising in that suit, should be referred to the determination of three designated arbitrators, whose award when made, they bound themselves to abide by and perform. That the arbitrators named in the agreement and the parties met, and proceeded to trial, and after a full hearing of all the evidence adduced on both sides, the arbitrators disagreed and were unable to make an award, and no award had been made by them.

A demurrer was filed to this replication by the defendant, and having been sustained, a judgment was rendered against the plaintiff from which he has appealed to this Court.

The legal effect of an order dismissing a suit *agreed* is, to bar any other suit between the same parties, on the original cause of action thus adjusted by them, and

The legal effect of an order dismissing a suit *agreed* is to bar any other suit

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merged in the judgment of the Court, rendered at their instance, and in consequence of their agreement. (*Bank Commonwealth* vs *Hopkins &c.*, 2 *Dana* 395.)

between the same parties on the original cause of action thus agreed by them and merged in the judgment. (2 *Dana* 395.)

A new cause of action may arise upon the agreement of the parties, that produced the order dismissing the suit; and there might possibly be cases, where by the terms of the agreement a suit could be maintained upon the original cause of action, but it would be alone by virtue of the stipulations contained in the agreement of the parties.

The parties dismissed their suit *agreed* and agreed to submit the controversy to arbitrators—the arbitrators met but could make no award. Held that the original cause of action was merged and no suit could be maintained upon it.

If such a case can however exist, the present is not one of that character. The agreement contains no provision authorizing the plaintiff in any event, to bring a new suit upon the same cause of action. If the agreement upon which the suit was dismissed, does not afford an adequate remedy, it should not have been entered into by the plaintiff. If the parties contemplated a resort to any other mode of adjusting the matters in controversy between them, upon a failure of the arbitrators to make an award, a stipulation to that effect should have been inserted in the agreement. Such a provision may have been omitted intentionally, and the agreement entered into in its present form, with a view to prevent further litigation, upon the very reasonable assumption, that if the justice of the plaintiff's demand was so doubtful, that three impartial arbitrators could not make an award in his favor, the claim was of too questionable a character to be further prosecuted. Besides, although no award had been made when this suit was commenced, one may yet be made by the arbitrators.

The order of the Court dismissing the suit agreed, if obtained by fraud, might be set aside in a proceeding for that purpose. But as it forms a bar to another suit, for the same cause of action, so long as it remains in full force and unreversed, and as the matters contained in the plaintiff's replication were insufficient to obviate its legal effect, the judgment of the Court below, sustaining the demurrer, was correct.

Wherefore the judgment is affirmed.

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R. J. Browne, Riley, and Shuck for appellant; *Hill and Thurman* for appellee.

Smithpeters *vs* Griffin's Adm'r.

CHANCERY.

ERROR TO THE GARRARD CIRCUIT.

Case 72.

Witness. Evidence. Infants.

JUDGE SIMPSON delivered the opinion of the Court.

June 13.

THE deposition of James W. Griffin, a son of the complainant, was taken during the lifetime of his father, who having died during the pendency of the suit, it was revived and carried on in the name of his widow, who administered on his estate. The deposition was then excepted to and the exception overruled.

The deposition of a witness taken while he is competent sho'd not be rejected, when he thereafter becomes interested in the suit by the death of the party who took his deposition. (*Greenleaf on Ev.* 190.)

The witness was competent at the time his deposition was taken. The fact that he afterwards became interested in the subject matter in controversy, as one of the distributees of the complainant in the original bill, by his death, is not sufficient to deprive the administrator of the benefit of his deposition: (1 *Greenleaf on Evidence*, 190.)

Evidence should be confined to the point in issue between the parties.

But his testimony, so far as it went to establish a confirmation of the contract made by the plaintiff in error during his infancy, after he had arrived at full age, should have been excluded upon the ground, that the pleadings did not put that matter in issue between the parties.

Testimony taken to establish a fact not put in issue by the allegations of the parties in chancery should be excluded. (7 *B. Monroe*, 189.)

The complainant in his original bill asserted a demand against the defendant. The latter, by way of defence, relied upon his infancy at the time the contract was entered into, and that the demand was not for necessaries. These were the only points involved in the issue. If the complainant intended to rely upon a confirmation of the contract by the defendant after his arrival at full age, he should have alleged the fact

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SMITH PETERS vs GRIFFIN'S AD'R.

either in his original bill, or an amendment filed for that purpose, and having failed to do so, testimony to establish it was wholly irrelevant: (*McCandless & Co.* vs *Hadden*, 9 *B. Monroe*, 189.)

A horse considered not necessary for an infant in the particular case.

The infancy of the defendant was proved and it does not appear that the horse purchased by him could be deemed necessary for him, taking into consideration his condition and circumstances in life, at the time of the purchase.

It is very questionable whether under all the circumstances, the testimony could have been regarded as sufficient to establish a confirmation of the contract by the defendant, if that matter could have been inquired into in the state of the pleadings between the parties. But if the fact had been alleged by the complainant and denied by the defendant, thereby making an issue between them, it is clear it would have been insufficient for the purpose in opposition to the denial of the answer, as one witness alone testified upon the subject.

The defendant having sustained his defence, the Court erred in rendering a decree in favor of the complainant.

Wherefore the decree is reversed, and cause remanded, with directions to dismiss the complainant's bill with costs.

Dunlap for plaintiff; *Burton* for defendant.

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Beall *vs* Barclay &c.

CHANCERY.

APPEAL FROM CHRISTIAN CIRCUIT.

Sasseen *vs* Same.

WRIT OF ERROR TO THE CHRISTIAN CIRCUIT.

Case 73.

Witness. Evidence. Liens. Mortgages. Attachments.

JUDGE GRAHAM delivered the opinion of the Court.

June 14.

The case stated.

THE appellees, complainants in the Circuit Court, by proper allegations in their bill, obtained an attachment, on a tract of five hundred and eighty-one acres, and one of twenty-nine acres of land, the property of Harrison, to satisfy a debt which Harrison, with other obligors, who are insolvent, owed to them. The bill was filed and process issued thereon, on the 6th January, 1844. Several executions had previously issued against Harrison's estate, and were then in the hands of the Sheriff. After process had been served on Harrison, he in February afterwards sold and conveyed to Sasseen two hundred and twenty-eight acres of the land. The greater portion of the sum paid by Sasseen was applied to payment and satisfaction of these executions.

Barclay and Ryan, at the March term 1844, obtained a judgment at law against Harrison, execution issued upon it, which together wih some seven or eight other executions were levied on the land attached, and at April 1844, the land was sold and Beall became the purchaser at the price of $120. In June afterwards, these executions having been levied on Harrison's equity of redemption in the land, it was sold, and Beall became the purchaser for the sum of $2200 25. The aggregate amount of these sales being divided *pro rata* among the several executions, that of Barclay and Ryan was credited by $620 63, leaving more than half

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BEALL vs BARCLAY &c. SASSEEN vs SAME.

their demand yet unpaid. By an amended bill, Sasseen and Beall were made defendants, and because their respective purchases had been made *pendente lite*, a decree was sought to sell the land for the residue of the debt, and on a final hearing the Court so decreed. Various errors have been assigned by Beall and Sasseen, the former having appealed from and the latter prosecuting a writ of error to the decree.

Where two chancery attachments are obtained the complainant in the bill for the second attachment is a competent witness for complainant in the first.

It is not necessary to notice these errors in detail. The proof in the cause justified, as we believe, the issuing of the attachment. Boyd having also obtained an attachment in Chancery, which had been levied on this land or a part of it, was used as a witness for complainants. The Court overruled an objection to his competency, and we suppose rightly done so. He was not a party to this suit, and its decision in favor of the complainants could not promote his interest. The objections against him were to his credibility and not to his competency as a witness.

Copies of notes in the hands of a third person who can be required to produce them are not competent evidence.

It was not proper to permit the copies of the two notes of Beall to be read as evidence. They were in the hands of a third person who could have been compelled to produce them on the trial had their production been necessary, but as Beall substantially admits the facts which these copies conduce to prove, their admission as evidence did him no injury.

The statement of a vendor after he has passed his title are not evidence against vendee.

The statements of a vendor made after he has conveyed his title, are not evidence against his vendee. Besides the deed made to Beall by the Sheriff, Harrison had also conveyed to him afterwards. Harrison's subsequent statements, so far as they affected the interest of Beall, should have been execluded. These are, however, all minor and unimportant points in this controversy, which mainly turns on the facts already stated, taken in connection with the following. It is proved that Barclay, one of the complainants was present at the last sale, and was himself a bidder. The Sheriff, at the time of making the sale, gave public notice that attachments had been levied on the land. It is proved by Hays and others, that Hays, as the lawyer of Boyd

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and as the *advertiser* of Barclay, gave, at the time, public notice of the pendency of these attachments in Chancery, that they would overreach the Sheriff's sale, and that the purchaser would buy, subject to these attachments. It is also proved by Hays that whilst the sale was going on, Beall, in a private conversation, stated in substance that he knew of the pendency of the attachments.

In view of the facts stated, it is now insisted that the levy of the complainant's execution on the land, and one of them being a bidder at the sale, was virtually a waiver of the lien previously acquired by their attachment in Chancery. The case of *Waller* vs *Tate*, (4 *B. Mon.* 531,) is cited in support of this position. That was the case of a mortgage. The equity of redemption in the property mortgaged was not the subject of sale for the debt secured by the mortgage. The land was sold in the usual terms without any reference to mortgage or equity of redemption. It was a sale of the land for the mortgage debt, and an application of the proceeds to its satisfaction. Such a sale could only be effectual by the actual or presumed surrender of the mortgage title. It was, therefore, determined that as the mortgagee directed and sanctioned the sale, received the proceeds and did not object to or quash the sale, his conduct implied an admission of title in the mortgagor, and an abandonment of any inconsistent title in himself, "and preclude him in a Court of Equity from setting up the mortgage against the purchaser." This case is essentially different. It is that of a lien acquired not by mortgage, but by attachment in Chancery. In the case of *Oldham* vs *Scrivener*, (3 *B. Mon.* 580,) where Oldham and others had levied attachments in Chancery on Scrivener's land, and afterwards Oldham having obtained a judgment at law, caused an execution on his judgment to be levied on the land attached, purchased it himself and procured the Sheriff's deed, it was held that the proceeding was not unauthorized or illegal because of the prior levy and pendency of the proceedings in Chancery. The Court say,

Though a mortgagee who stands by at a sale of the mortgaged property and does not assert it and receive these proceeds of the sale will be estopped thereafter to assert it, (4 *B. Monroe*, 531) yet it is not so where the lien was acquired on the property by attachment in chancery. (3 *B. Monroe* 133; *Ib.* 580.)

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O'NEAL & WIFE vs BEALL.

Nor is the legality of the transaction affected by the fact, that the transfer by Mock, the payee, was merely formal, and that he never had any beneficial interest in the paper. Had Mock endorsed the note in blank to have enabled Scales to negotiate it, and to procure the money from some other person, and it had thereby passed into the hands of an innocent holder for a valuable consideration, Smith, the surety, would certainly have remained liable. The transfer by Mock without recourse does not essentially alter the case. Moberly did not commit a fraud in receiving the note instead of the money. As Mock was unable to accommodate Scales by loaning him the money, it was not fraudulent upon his part to transfer the note to Moberly to effect the same object that would have been attained by the loan of the money. The whole arrangement was for the benefit of Scales, for whose use and accommodation Smith executed the paper. There does not, therefore, seem to be any reason for characterizing the transaction as fraudulent.

Wherefore the decree is affirmed.

J. & W. L. Harlan for plaintiff; *B. & A. Monroe, Daviess, and Taylor* for defendants.

REPLEVIN.

Case 75.

O'Neal & Wife *vs* Beall.

ERROR TO THE MARION CIRCUIT.

Trusts. Equity jurisdiction. Pleading. Practice.

June 15.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The case stated.

UNDER the will of Lanham, the slave, King, devised to his wife during life or widowhood, was, even in the event of her marriage, to be retained by her until the youngest child of the testator "may get its education," provided she should choose to keep the children and give them a common English education, and "when the youngest child may get its education," the boy was to be hired out for the benefit of the children until the

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demands. The decree should have protected Sasseen to the extent of the payments thus made by him to satisfy the said previous executions.

We think the Court also erred in postponing the sale of that portion of the land purchased by Sasseen until after the land bought by Beall should have failed to pay the debt due to the complainants. The fact that his purchase was prior to that of Beall, and that after his purchase a sufficiency of the land was probably left to satisfy the complainants' demand, ought not to make any thing in his favor. Both purchases were made subject to the complainants lien in equity. The following principles applicable to this case have been heretofore recognized and settled by this Court. "A mortgage binds every part of the land it covers, and each spot is subject to its operation, and where it is made to bear on purchasers of different parcels from the mortgagor, they are bound to contribute only in proportion to the value of the share that each holds:" (4 *Monroe*, 76.) "Slaves mortgaged and afterwards sold to different purchasers are all liable to the payment of the mortgage debt, but, as between the purchasers, equity will enforce contribution on principles of equality between them: (1 *Lit.* 319.) Same principle in 3 *B. Monroe*, 50, and in 8 *B. Monroe*, 314, and the numerous authorities cited in the last case. These were all cases of mortgages. We regard the principle as equally applicable to the equitable liens acquired by proceedings and attachment in Chancery. The Circuit Court should, therefore, have ascertained the respective value of the lands bought by Sasseen and by Barclay, the value to be fixed as of the time of rendering the decree, and from that value deduct the sums paid by the respective parties on executions for which they are entitled to credit as herein before suggested, and then according to the remaining estimated value, apportion the sum to be raised out of each part of the land. If by a decree, thus rendered, it shall turn out that one defendant is divested of all his land, and the complainant's debt still unpaid, they will have a right to subject

purchasers should be indemnified by a repayment of his money before the attaching creditor is paid.

Where there are several purchasers of property of a mortgagor, each is bound to contribute proportionably to the satisfaction of the mortgage. (3 *B. Monroe*, 50; 8 *Ib.* 314) So of purchasers of property on which there exists a lien by attachment in chancery. The value of the property at the date of the decree for sale is the proper period for ascertaining the liabilities.

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O'NEAL & WIFE vs BEALL.

But a court of equity can alone give the executor the possession of the slave, it it be denied to him—the widow being a trustee.

But according to the case just cited, (7 *Monroe* 310,) the executor had a mere naked power to hire and sell without the legal title, or a legal right to the possession or any legal remedy for obtaining it, though necessary for the exercise of his power. In that case, the event upon which the power of sale was to be exercised was the death of the testator's widow, which had actually happened, and there was, therefore, no question that the power might then be exercised according to the will. Yet the Court in that state of case say, (page 310,) "If there can be any possible means by which he can recover the possession, it must unquestionably be by a suit in equity." Of course this merely equitable right to the possession could not have availed him in a Court of Law, as a justification for forcibly taking the slaves which he was empowered to sell.

But the circumstances of the present case operate much more strongly against such a defence and in favor of the position that the only remedy is in equity. For first, the termination of the widow's right upon which the power of the executor to hire the slave depends, is not ascertained by any physical event, nor by mere lapse of time, but depends upon a fact or contingency which may be accelerated or postponed by circumstances; and the time of its happening, though expected to occur before the time when the slave is to be sold, may, without a violation of the will, be in fact postponed, so that there shall be no room for the power of hiring, and, therefore, not even an equitable right in the executor to have the possession for that purpose. And, secondly, the possession of the slave was permitted by the will to remain with the widow after her second marriage to enable her to perform the trust of maintaining and educating the children, and until that trust should be performed by the education of the youngest child. It was, doubtless, the duty of the widow, as trustee, to perform the trust in reasonable time according to the circumstances. But it does not follow, and we do not admit that either the executor

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or a Court of Law has the right to take cognizance of her conduct and duties or rights as trustee, and to deprive her of her possession and office upon their judgment of her want of reasonable diligence in the performance of the trust. These matters pertain especially to a Court of Equity, which has not only for the most part exclusive jurisdiction over trusts, but which alone can coerce the trustee to a performance of the trust, or ensure its performance by another. If a Court of Law deprives the trustee of possession for neglecting the performance of the trust, it leaves the trust unperformed and unprovided for.

The replication, it will be observed, traverses the averment that the youngest child had been in fact educated, &c., before the seizure of the slave by the executor, but does not traverse the averment that a reasonable time for his education had elapsed. And we presume it was for failing to traverse this averment that the replication was adjudged bad, while either of the two averments was deemed by the Circuit Court a sufficient defence to the action. But if these averments can be separated and if either of them could be deemed material and sufficient, it would surely be that one which shows that the trust was accomplished, and, therefore, that the power of hiring by the executor had attached, and not the one which merely showed that the trust might and ought to have been accomplished, but leaves it doubtful whether the power of the executor has attached, or whether the trust being unaccomplished should be enforced. If the averment that the youngest child had in fact been educated were sufficient and the plea therefore good, then the replication traversing the material averment was also good, and should have been so adjudged on the demurrer. For if the affirmative matter in the replication be regarded as immaterial, it certainly does not injure the case of the plaintiff, nor vitiate the substantial answer to the plea. And if it be regarded as of itself presenting a sufficient answer, and thus making the plea double, this objection is unavailable on general demurrer, and the affirm-

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ative matter should have been answered. Even in this view of the case, therefore, the demurrer to the replication should have been overruled.

If a plea be insufficient a demurrer to the replication sho'd be overruled on account of the insufficiency of the plea.

But for the reasons before given and the authority above cited, we are of opinion that the plea is wholly insufficient to bar the action, because it does not show a legal right in the defendant, as executor, to take the slave out of the possession of the plaintiff at his own will. It follows that the demurrer to the plea having been withdrawn, the demurrer to the replication should have been overruled on account of the insufficiency of the plea which in its present form requires no answer.

By the practice in Kentucky, a party whose demurrer is overruled may withdraw it and plead any matter which he might have plead at first. So he should have the same privilege upon the return of a case from this Court, and the like practice should govern in respect to other subsequent pleadings.

But we are also of opinion that the Court erred in sustaining the demurrer to the defendant's first plea, which averred the taking to have been with the consent of the plaintiff, which is to be understood as embracing and meaning both plaintiffs, and is, until answered, a bar to the action. The demurrer to it having been decided in favor of the plaintiff, he had no opportunity of afterwards replying. And under the practice in this State which allows a party, at his own option, to withdraw his demurrer if decided against him, and to plead any matter of fact which he might in the first instance have pleaded, he should be allowed the same privilege on the return of the cause to the Circuit Court, as would have been the case if a judgment against a defendant upon a demurrer to his plea were reversed by this Court.

With respect to the affirmative matter contained in replication to the second plea, we deem it only necessary to say in the present attitude of the case, that as the executor claims no right in or power over the slave, except under the direction of the will, that he shall be hired out and afterwards sold for the benefit of all of the testator's children, they being exclusively entitled to the proceeds, may, at their election, take and control the slave himself when they are competent to make an election. We presume, however, that this part of the case cannot again come in question. And as to the legal title to the slave, as it was not in the executor, it is

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immaterial whether it was in the widow after her second marriage, or in the heirs to whom it descended, subject to the devise to her and to the power given to the executor.

Wherefore, the judgment is reversed and the cause remanded with directions to overrule the defendant's demurrer to the replication to the second plea, on account of the insufficiency and immateriality of that plea, and to overrule the plaintiffs' demurrer to the defendant's first plea, and for further proceedings not inconsistent with this opinion.

Rountree & Fogle and Ben. Hardin for plaintiffs; *Shuck and C. A. Wickliffe* for defendant.

Muir *vs* Cross, &c.

CHANCERY.

Case 76.

ERROR TO THE TODD CIRCUIT.

Vendor and Vendee. Lien. Waiver of lien.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 15.

The case stated.

ON the 22 day of February, 1842, M. Hill conveyed a tract of land to E. B. Haskins by deed, reciting the consideration as being secured by four notes for $1095 each, payable in cash notes, and at annual intervals, the two last falling due in the years 1845 and 1846, respectively. On the same 22d February, T. Cross also conveyed to E. B. Haskins about 50 acres of land adjoining the tract just referred to, for the consideration as recited in the deed, of the grantee's note for $900, dated December 1842, bearing interest from the date and credited by $327 50. When this note fell due is not stated in the deed. But it appears in fact that it was payable with interest in three years after its date, which was also the date of the contract of sale. These deeds were duly recorded, and Haskins being in possession sold the land to H. Muir, and on the 2d day of January, 1845, before either of the two last notes of

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Muir vs Cross &c.

Haskins to Hill had become due, conveyed to him both parcels of land, as one tract, for the recited consideration of $3,050 in hand paid, and Muir executed his note to Haskins for $1,350, the part of the consideration which had not in fact been paid. In February 1843, Hill executed to Cross a mortgage conveying a number of slaves, many articles of personal property, and also the two last notes of Haskins to Hill, which are specifically described and stated to be for the price of the land, &c. All being for the security of a debt mentioned in the mortgage. Upon a settlement between Cross and Hill's administrrtor, and as we understand after the conveyance from Haskins to Muir, the note of Haskins to Hill, falling due in 1846, was assigned to Cross by Hill's administrator, who retained, in absolute right, the other note. And upon a settlement between Cross and Haskins, made in December 1845, including various items on each side, Cross surrendered to Haskins the note for $1095, which had been credited by $214, and received from Haskins by assignment the note of Muir for $1350, reduced by a credit to $1250, and Haskins executed his own note to Cross for near $1300, the balance still left.

After all of these transactions, the administrator of Hill having filed a bill for a general settlement of his intestate's estate, under the act of Assembly, claimed a lien upon the land sold by Hill to Haskins and by the latter to Muir for the amount of the note for $1095 in his hands, and alleged the insolvency of Haskins. Muir, in answer to this claim, avers that he had paid Haskins for the land, except the sum due on the note assigned to Cross; that he had made the payments and received the conveyance in ignorance of the non-payment by Haskins of part of the price of the land; that Cross knew the facts when he received the assignment of his, Muir's note, and was moreover notified by him that he would not pay the note, leaving an incumbrance on the land, and prays that if the land is subjected to the lien asserted by the administrator of Hill, his note in the hands of Cross may be credited by the same amount.

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Cross admits that before the note was actually assigned to him, Muir had told him there would be a difficulty in consequence of the note in the administrator's hands, but denies that he said he would not pay, &c. And alleges that in a previous conversation, Muir had told him he would pay it, but does not say that the incumbrance was then spoken of by either, and he says that before the last conversation he had agreed to take Muir's note from Haskins and felt bound to do so. He moreover alleges that as the holder of the note of Haskins to Hill, due in 1846, he had a lien on the land for the amount of that note, and that in the settlement with Haskins, (of 1845,) it was specially agreed and understood that he took the note of Muir (which he says was also a lien on the land) in lieu of the note of Haskins to Hill then surrendered. He also states that a further consideration for the note of Muir was the remnant of the note for $900 which had been executed by Haskins to him (Cross) for the price of the small tract which was included in the sale to Muir, but which had been given up to Haskins on a settlement in 1844. He insists that Muir had constructive notice of the liens from the deeds on record, and believes that he had actual notice when he purchased, but he does not allege that he ever informed Muir that one of the notes of Haskins to Hill was in his hands or that he claimed any lien on account of that note or for any part of the price of the small tract. Muir denies actual notice, as before, and also denies that he had ever made or promised payment after actual notice, or that he had promised payment to Cross at any time unless the incumbrance should be removed.

There is no evidence outside of these pleadings of what occurred between Cross and Muir. Two settlements between Cross and Haskins are proved by Haskins, and the second one also by Laprade, who was present. It appears that in the settlement of 1844, various items on both sides were introduced, among which was the note for $900, or the balance remaining due on it which is nowhere stated, and the result was a bal-

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ance of near $1500 against Haskins for which he executed his note. But no further particulars of this settlement are made known. Of the settlement of 1845, a statement is exhibited which shows various items on each side, among which is the note for $1095, and also the note for near $1500 charged to Haskins, and the note of Muir for $1250 credited to him. But there is nothing either in this statement, or in the assignment of Muir's note, to indicate that this note was taken specially in lieu of the note of Haskins to Hill. And although Laprade says that this was particularly mentioned by Cross, and as he understood agreed on by the parties, yet as Haskins has no recollection of it, the inference is, that although it may have been mentioned by Cross, it was not in such terms as to attract the attention of Haskins or to prove any mutual understanding, or to indicate more than the opinion or belief of Cross that in surrendering the one note and receiving the other, both being for the price of the same land, he retained his lien, or he may have declared this to be his intention. It is not intimated either in the pleadings or evidence that any thing was said on that occasion about the note for $900, or the price of the tract which Cross had sold to Haskins, or any lien therefor.

The decree of the Circuit Court

The Court having ascertained the cash value of the note for $1095 to be $985, decreed, in substance, that the land conveyed to Muir was subject to the payment of the note remaining in the hands of Hill's administrator with its interest, and refusing any credit to Muir on that account, remitted Cross to his remedy at law upon Muir's note for $1250.

The decree thus, in effect, subjects Muir to the payment of about $2250 of the debts of Haskins for the land when his debt to Haskins for the same land amounted only to $1250, and when the two notes of Haskins to Hill reduced to their cash value and credited by the payments made on one of them in the hands of Cross, amounted to less than $1800. This can only be justified upon the principle that the land in Muir's hands was subject not only to the lien for the note retained by

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Hill's administrator, but that it was subject also (or that Muir was liable) for the amount due on the note which Haskins had assigned to Cross, and that Cross still had a lien on the smaller tract for a portion of the price equal to the difference between the amount of the two notes of Haskins to Hill and the amount for which Muir is held liable by the decree. It is only upon these grounds that after subjecting the land to the payment of the note held by Hill's administrator, Muir can be liable for the full amount of his note to Haskins.

With regard to the lien in favor of Hill's administrator, who retains the original note for part of the price of the land, there is, and can be, no dispute. Nor is there any ground for maintaining that Muir lost or that Cross acquired any advantage or equity by reason of the conversations between them before the note of the latter was assigned. On the contrary the fact that Cross was told by Muir before the assignment that there would be a difficulty, which certainly might have released him from any obligation to take the note from Haskins, and his failure to make known any claim of lien on his own part, tend not only to rebut any equity growing out of the conversations between him and Muir, but in fact to increase the equity of Muir against any claim of lien by Cross. Nor should we deem it material even if it clearly appeared that in the settlement between Cross and Haskins, it had been expressly agreed between them that Cross should retain the lien which he unquestionably had while he held the note of Haskins to Hill. As Haskins had no right to any lien except such as might attach to his note on Muir, such an agreement would amount to nothing more than a declaration by Cross that he intended to retain his lien.

Notes given for the purchase of land remain a lien upon the land though they may be renewed.

The question on this part of the case, in the most favorable shape for Cross, is whether by surrendering his note on Haskins, to which the lien attached, and taking the note of a third person, even if it had been of the same amount and blended with no other transaction, he would not have waived or lost his original lien, and

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placed himself precisely in the condition of the assignor from whom he received the new note. Suppose that Haskins, instead of assigning the note of Muir, a purchaser of the land which was in lien, had assigned the note of a stranger, receiving for it his own note, to the prior vendor, which had been assigned to Cross, we think it perfectly obvious that the original lien attaching to the surrendered note, would have been extinguished by the surrender of that note, and that Cross, as assignee of the new note, would not only have held it subject to all the equities which the obligor had against the assignor, but could have asserted no lien or equity against the land, but such as his assignor might have asserted, and would in the assertion of any such lien or equity have been subject to any counter equity of Muir against Haskins, and especially to such as was incident to their relation as vendor and vendee. When the payee of a note surrenders it to the payer, taking his note for the amount due at a future day, this is a renewal of the note and a continuation of the same debt, and has been properly regarded as not affecting an extinguisbment of the lien pertaining to that debt.

But where the holder of a note given for land surrenders it, and takes the note of another, assigned to him by a third person, it is no *renewal* and the lien is lost—it is a new debt, and the remedy of assignee against assignor is the only remedy in case of the insolvency of the obligor.

But when the payee or his assignee surrenders the subsisting note and takes another not executed by the original payer, but payable to him by a stranger and assigned by him to his creditor, this is no renewal or continuation of the original debt, but an extinguishment of it. And whatever might be the case, if the payee of the original note, thus taking by assignment, the note of a third person were himself the vendor having independently of the note a lien for the debt as part of the price of land, as to which we need not decide; we think the necessary consequence of such a change of the debt by the assignee of the note for the price, is to extinguish the lien which he holds, merely as assignee of the original debt, and to merge all of his previous claims and rights as assignee of the original note or debt in such as belong to his new attitude as assignee of the new debt upon a stranger. The debts are not the same. In giving up the first and taking the other,

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he surrenders his rights as assignee of the original debt and assumes others as assignee of a different debt. If his new debtor should become insolvent, or should set up an equity against the demand which destroys its value, this may give him a ground of recourse against his assignor, but does not restore him to his original debt or to the rights pertaining to it, and therefore does not resuscitate any right or remedy which, as holder of the original debt, he might once have had against third persons.

We think the case, as it occurred, is substantially the same in principle, and is not affected by the fact that the note assigned in lieu of the original debt, was given for the price of the same land on which the original lien existed. The original debt was extinguished, and with it, the original lien. And Cross putting himself voluntarily in the place of the assignor of the new debt, has no other lien or equity against the new debtor, than his assignor had and becomes subject like other assignees to any equity of the obligor against the payee affecting the consideration of the note, or existing before notice of the assignment. The note of Muir, assigned by Haskins to Cross, had no lien on the land, except on condition of the removal of the prior lien, without injury to Muir. His liability to injury by the prior lien, gave him an equity against Haskins to withhold payment until the prior lien was removed, or to have a credit on the note for any payment on the land, he might be compelled to pay on account of the prior lien; and as he was under no liability to Haskins beyond the amount of his note, upon paying subsisting prior liens to that amount, his note would be discharged in equity. As assignee of that note, therefore, Cross could claim only the balance remaining due after crediting the amount paid by Muir in discharge of subsisting previous liens; as assignee of Hill, he could claim nothing of Muir, because Muir had never been directly indebted to Hill, and Cross had ceased to be the assignee of the original debt, and neither Muir nor the land was subject to the original lien, because the debt

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MUIR vs CROSS &c.

to which it was incident was satisfied and the lien extinguished.

Where a note due for land sold has been united and compounded with other dealings between vendor and vendee, so as to render difficult to ascertain the real balance due for the land, and it is not done—Held that the claim of lien should be rejected.

Then as to the note or debt of $900 for the price of the land sold by Cross to Haskins, we are satisfied that after two settlements, including this note and blending it with other transactions, in the manner above stated, whereby its identity was wholly lost, and no means left for tracing it, and after such a lapse of time from its date and maturity, as in connection with its surrender, authorized the inference that it was satisfied; and in the absence of any direct assertion of a lien on that account, and of any attempt by pleading or evidence to show what, if any thing, was due upon it, or how it was disposed of in the first settlement, in which alone it was specifically noticed, it cannot be indirectly allowed for any purpose, so as to affect a third person, who might well presume its discharge, and to whom it was not mentioned by Cross, when it might and should have been, if intended to be asserted as a subsisting lien. In fact there are no means, so far as we can perceive, of identifying the surrender, if any; and if there were, we are not prepared to admit that it could be enforced as an operative lien against a stranger, after having been not only blended, but merged in other larger notes and transactions, and without discrimination as this has been.

The case of *Honore* vs *Bakewell*, (6 *B. Monroe*,) furnishes no authority for continuing or resuscitating a lien in either of these cases. And to do so, in the latter case especially, would subject subsequent purchasers to a hazard, against which no reasonable diligence could protect them, and which is not required by any just regard for the interest of the prior vendor.

The fact that Muir would be in no worse condition if he were compelled to pay the amount of the two last notes, notes of Haskins to Hill, than if the assignee of one of these notes had not surrendered it to Haskins, furnishes no reason why Muir should not insist upon the legal effect of the surrender to avoid a loss which the law would have thrown upon him, if the note had not

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been surrendred, and no ground for refusing to him the advantage which has thus accrued, without any impropriety on his part, from the voluntary act of the party holding the adverse interest. And although it be true that the inability of Cross to collect the assigned note on Muir, by reason of the equity of Muir against the assignor, Haskins, might, as between him and Haskins, entitle him to a rescision of the contract and to be restored to his former rights, yet he could not be restored to his former lien, because being extinguished by the first transaction, it cannot be resuscitated, or if it could be, there is no reason why in this contest for avoiding a loss, either party should be favored, by relieving him at the expense of the other from a disadvantage which he has voluntarily and unnecessarily brought upon himself, Cross is entitled to no peculiar favor as against Muir. And as Haskins has no equity against Muir, whereby to subject him to the payment of any thing beyond his note for $1250, Cross can derive no such equity from him. The precise period when Haskins became insolvent does not appear. He was, during a part of these transactions, regarded as entirely solvent, and was doubtless considered, by both Cross and Muir, both able and willing to meet any responsibility that might devolve upon him. Muir doubtless trusted to his integrity and ability in making payments for the land without ascertaining, as he might have done, its subjection to a lien; and he would have suffered from the consequences of his subsequent insolvency and his own want of vigilance, if Cross, confiding either in Haskins or in his own judgment, had not by surrendering his lien relieved Muir and subjected himself to the loss.

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The result of these views is that Muir is not bound to pay any thing beyond the amount of his note to Haskins; that upon his cross-bill he is entitled to a credit upon that note for the amount of the debt of Haskins to Hill's administrator, for which a lien on the land is decreed, and that Cross should be allowed to enforce against him the residue only of the note assigned to

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MAXWELL vs GOODRUM.

him by Haskins. There is no question on the decree as between Cross and Haskins.

Wherefore, the decree is reversed, and the cause remanded for a decree in conformity with this opinion.

Morehead & Reed and Underwood for plaintiff; *E. M. Ewing* for defendants.

PET. & SUM.

Case 77.

Maxwell *vs* Goodrum.

APPEAL FROM THE MARSHALL CIRCUIT.

Petition and Summons. Sealed Instruments.

June 17. JUDGE SIMPSON delivered the opinion of the Court.

Case stated.

GOODRUM brought a suit against Maxwell by petition and summons on a promissory note executed on the 14th December, 1846, and obtained a judgment by default.

The defendant then appeared and moved to arrest the judgment, because, first, the words "or order," contained in the note, were omitted in the copy of it, set forth in the petition; and secondly, because the note itself had a seal appended to it, which was not shown by the copy inserted in the petition.

The motion in arrest of judgment was overruled, and the defendant has appealed.

The words "or order" in a promissory note are not an essential part of such note and not important to its validity. It is assignable with, or without such words.

A mere promissory note, for the payment of money, has the same effect under our statute and the law which operates in this State upon such writings, with or without the words "or order" following the name of the payee. These words are not necessary to render it assignable, nor do they impart any additional validity to the writing. They are, therefore, an immaterial and not a substantial part of the note.

A seal, since the statute of 1812, (1 *Stat. Law*, 343) is not an essential part of

The statute of 1812, (1 *Stat. Law*, 343,) abolished the common law distinction between sealed and unsealed writings for the payment of money; and as this note was executed since the passage of that act, it has, in

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our State, the same effect and dignity without the seal that it has with it.

The petition in a suit of this kind, only professes to set out the substance of the note sued on. The alleged omissions being merely of immaterial parts of the note do not show that the petition did not contain a substantial copy of the note upon which the suit was founded.

Wherefore, the judgment is affirmed.

Williams for appellant; *Palmer* for appellee.

a note, and therefore it is not a fatal defect in a pet. & sum. to omit placing the seal to the copy in the pet., though it be to the note —setting out the note in substance is sufficient.

Young and Wife *vs* Miles' Executors.

CHANCERY.

APPEAL FROM THE NELSON CIRCUIT.

Case 78.

Construction of Wills. Devises in Trust.

JUDGE SIMPSON delivered the opinion of the Court.

June 19.

CHARLES MILES, by his will, devised nearly all his estate, real, personal and mixed, to three of his nephews, or the survivors or survivor of them forever, as trustees and executors, to hold in trust "for the sole and separate use of his daughter, Eliza Ann, and the heirs of her body forever."

Case stated in the bill and exhibits.

The testaor gave specific directions in reference to the education of his daughter, and the amount of her allowance and expenditure during her minority and previous to her marriage. His will then contains the following provision, viz:

"Should my said daughter marry with the free consent of my trustees, then, and in that case, they may permit my said daughter and her husband to have the use of the said property hereby devised, but subject to the entire control of my said executors and trustees for the benefit of my said daughter or any child or children she may have; but should my daughter, as aforesaid, die without being married, or being married die without children, then, and in that case, my said estate shall descend to four of my neices, namely," &c.

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YOUNG & WIFE vs MILES' EXEC'RS.

Eliza Ann, the daughter, having intermarried with Samuel B. Young, with the full consent and approbation of the trustees, Young and wife exhibit a bill in chancery, in which they allege that the profits of the estate, since the death of the testator, have amounted to about three thousand dollars a year, now making a large sum. They claim the whole of these profits under the will as belonging to them, and a right to the use and possession of the whole property devised.

During the pendency of the suit the devisee, Eliza Ann, gave birth to a son, who was made a defendant, and appeared by his guardian *ad litem*. The persons to whom the estate was devised upon the contingency of the death of the testator's daughter without being married, or being married without children, were also brought before the Court and made parties by the trustees.

Answer of executors and trustees.

The trustees resist the claim of the complainants, and contend that by a true construction of the will, the profits that accumulated during the minority of the testator's daughter and before her marriage, do not belong to her, but constitute a part of the testator's estate; that she is only entitled to the profits accruing upon those accumulations, and that they have a right to retain the possession of the whole estate, and control it according to their discretion.

It is not necessary in this case to decide, (nor does the question properly arise so as to admit of its decision,) what estate is conferred upon the testator's daughter by the provisions of his will. Whether she takes a mere life estate under the will, or a greater estate, is immaterial; in either case the complainants are entitled to the relief which they ask in this bill.

A tenant for life merely, nothing appearing to the contrary, has a right to all the profits that accrue during the continuance of the life estate. In case of a devise over, it is only the estate that belonged to the testator at the time of his death, that passes by the devise. The first taker is entitled to all the profits during the continuance of the estate devised to him or her,

A tenant for life merely, nothing appearing to curtail his right, is entitled to the whole profits of the estate—that the tenant for life, while a minor, is restricted

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and those interested in the devise over, have no right to nor claim upon such profits. There is nothing in this will to prevent the application of these general principles. Indeed they are peculiarly applicable in this case, as the testator's daughter was manifestly the chief object of his bounty; and even if he intended her to have no more than the enjoyment of his estate during her life, without the power of alienation, or the right to make any disposition of it that would jeopardize its security, or defeat the devise over after her death, still he evidently intended her to have the full and complete enjoyment of it during her life, under such limitations only as were necessary for the safety of the property devised. The direction given by him in relation to the amount of her expenditure during her minority, cannot be construed as a limitation upon her rights growing out of the nature of the estate devised to her. It was intended only to control her in the use of the profits that belonged to her, until she arrived at that age when she might be supposed to have discretion to manage them properly, and not to deprive her of the right to that portion of them, that she was not permitted to use and enjoy during her minority.

in the extent of the use of the profits of the estate, does not curtail the right thereto on arriving at full age.

Though the will has vested the legal title to all the property devised in the trustees, in trust for the testator's daughter, yet in equity she is deemed the owner during the continuance of her estate, and is equitably entitled to the possession of such property as will yield a profit in its use, unless the possession of it by her be inconsistent with the intention and design of the testator: *Montjoy and wife* vs *Lashbrook, &c.*, (8 *Dana*, 33.)

Though a life estate be vested in trustees, the *cestui que trust* is in equity the owner, and entitled to the use of such property as will yield profit in its use, unless otherwise directed: (8 *Dana*, 33.)

We think, moreover, that according to a reasonable interpretation of the language of the will, it was the intention of the testator in this case, that his daughter and her husband, upon her marriage with the approbation of the trustees, should be entitled to the possession of so much of the estate devised as consisted in specific property, the use of which they might prefer to a reception of the annual profits.

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Young & Wife vs Miles' Exec'rs.

The object of the testator was to place the legal title beyond the reach of the husband of his daughter, or his creditors, and he for this purpose devised it to trustees for her *sole* and *separate* use, and gave them such control over the property as is necessary to secure the beneficial use of it to his daughter as her separate estate, free from the claim of the husband or his creditors, and thus to carry into effect the purposes of the trust.

Where the use or profits of money and stocks are devised in trust to be under the control of trustees, they have the right to the possession thereof; they paying the profits to the *cestui que trust.*

Such of the property devised as can be used by the testator's daughter and her husband without being converted, they have a right to the possession of, the legal title to it, still remaining in the trustees, and also the right to control the property while it is in the possession of the husband and wife, so far as to prevent any disposition of it, which might defeat the intention of the testator in the creation of the trust. But the money and stocks belonging to the testator, at the time of his death, should be allowed to remain in the hands of the trustees, and the devisee and her husband take the annual profits arising therefrom, and also the profits in the hands of the trustees which have heretofore accruupon the whole estate. A decree to this effect will afford to the complainants all the relief that they have prayed for in their bill. And as the estate is held in trust for the sole and separate use of the wife, no decree in favor of her and her husband, beyond what she asks for and consents to, should be rendered, even were she the owner of the estate in fee simple, and a decree to this extent she is entitled to, if her estate be only an estate for life.

The Circuit Judge having entertained a different view of the rights of the complainants, refused to allow them any part of the estate, except so much as the trustees might think proper to give to them, and decided against their right to the profits that had accumulated prior to the marriage of the testator's daughter.

Wherefore, the decree of the Circuit Court is reversed and cause remanded with directions to render a decree in conformity with the principles of this opinion,

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giving to the complainants the whole of the unexpended profits that have accrued upon the estate since the testator's death, unless, at the instance of the wife, the trustees may be directed to retain it, subject to any disposition that she may think proper to make of it for her sole and separate use.

Riley, C. A. Wickliffe, and J. & W. L. Harlan, for appellant; *B. Hardin* for appellee.

Evans *vs* Sanders, &c.

APPEAL.

ERROR TO THE FLEMING COUNTY COURT.

Case 79.

Justices. County Courts. Appeals. Writs of Error. Jurisdiction.

JUDGE GRAHAM delivered the opinion of the Court.

June 19.

The case stated.

EVANS sued out a warrant 'in covenant on warranty' for $15 against Wrenchy, and another of the same character against Sanders. They were each dismissed by the justice for want of jurisdiction, and on appeal to the County Court, the appeals being heard together, that Court also, "on motion of the attorney for the appellees, dismissed each appeal for want of jurisdiction," and gave judgment for costs in their Court as well as before the justice. The record shows that the warrant in each case was founded upon a deed made by four heirs and devisees of James Sanders, deceased, of whom the appellees were two, conveying to the appellant a tract of land "for the consideration of the sum of sixty dollars (that is to say $15 per share) to them in hand paid," &c. The warranty in the deed is that said heirs, "each for his separate undivided share aforesaid in said tract of land hereby conveyed, warrants and will each separately for his own share forever defend said interest," &c. The County Court, we suppose, were of opinion that as the indenture was in the names of the four devisees, and as the entire consideration

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EVANS vs SANDERS&c.

was sixty dollars, the action should have been for the whole, and not to recover each one's portion separately. In this they were mistaken.

Where several grant in one deed the separate interest which each has in the estate, the covenant shall be considered to extend to the interest granted: (1 *Chitty* 47) and if separately, warrant to the extent of the interest granted, suit for the breach of the covenant shall be several.

The rule is this: In the case of parties demising or granting the separate interest of each in an estate, the covenant shall be considered co-extensive with the interest granted; and, therefore, these shall be several, where a several interest is granted; and joint, if a joint interest be granted: (1 *Chitty*, 47.) In this case, although all have united in the deed, it is in fact the separate covenant of each. The consideration is $15 to each, and the covenant *expressly stipulates that each heir warrants separately for his own share.* The plaintiff very properly sued out his warrant against each separately, and if he can prove a breach of the covenant of warranty, will be entitled to recover of each defendant.

Where the damages laid in a warrant for breach of covenant is less than £5, Justices of the Peace have jurisdiction.

The damages laid in the warrant being less than five pounds, the County Court had jurisdiction and ought not to have dismissed the appeal for want of jurisdiction.

Though no appeal or writ of error lies to this Court from a judgment of the County Court *affirming* or *reversing* the judgment of a Justice under £5: (1 *Stat. Law*, 133) yet this Court will reverse where the County Court having ny law jurisdiction improperly refused to exercise it: (10 *B. Monroe*, 193.)

But as "no appeal shall be taken from the County Court affirming or reversing the judgment of a Justice of the Peace, nor shall a writ of error be issued from the Court of Appeals to reverse the same," (1 *Statute Law*, 133,) it is insisted that this Court cannot revise the judgment of the County Court. The judgment in this case is neither an affirmance or reversal of the judgment of the Justice of the Peace. It is but a declaration by the County Court that they will not try the cause. The want of jurisdiction is the *reason* assigned for their refusal. This dismissal could not be plead in bar to a warrant or appeal subsequently prosecuted for the same cause of action: *Waggener* vs *Highbaugh*, (10 *B. Monroe*, 193.)

Because of the error in dismissing the appeal the judgment of the County Court is in each case reversed, and the cause remanded to that Court with directions to set aside the judgment, and try the appeals on their merits.

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Cavan for plaintiff; *Apperson and Andrews* for defendants.

Young *vs* Smith, &c.

EJECTMENT.

ERROR TO THE RUSSELL CIRCUIT.

Case 80.

Execution sale of land. Sheriff and sheriff's deed.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 20.

THIS action of ejectment was brought in 1839, on the demise of Frances Young, to recover a tract of land in the possession of Smith and others, in the county of Pulaski. On the trial of the case, the plaintiff read a deed, bearing date in 1810, from William Buford, conveying the land in contest to Barney Young and Frances Young, then husband and wife, and the latter being the present lessor; and also read a deed of 1819 from Barney Young, conveying the same land to one Schwink. In this deed the present lessor was not named as a party, but she signed it and relinquished her dower as certified by the Clerk. Other deeds were read conveying the land from Schwink, through intermediate grantees to the present defendants, who were proved to have been in possession at and before the time of serving the notice in this case. It was also proved that Barney Young had died some years before 1839. The defendants read two judgments for costs, &c., against the lessor, rendered in 1835 and 1837, for failing to prosecute two previous actions of ejectment in the same Court against the same and other defendants, also the executions thereon, showing a levy on 350 acres of land, the same quantity mentioned in Buford's deed of 1810, and a sale thereof for $20 16; and also a Sheriff's deed, executed before the commencement of this action, conveying the same as being the land in possession of Smith and Price, the defendants in this action. This deed was objected to by the plaintiff, and its admission as evidence was the only point reserved by ex-

Case stated.

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Young vs Smith &c.

ceptions on the trial. The parol testimony related principally to facts intended to bear upon the validity of the Sheriff's sale and deed, but no question was made or decided with respect to this testimony, except such as may be involved in one of the grounds alleged for a new trial; that the verdict is against law and evidence; the other being that the Court erred in admitting the Sheriff's deed to be read as evidence.

Verdict for defendants below; motion for new trial overruled.

The plaintiff's motion for a new trial having been overruled, the only ground seriously urged for the reversal of the judgment, relates to the admissibility and effect of the Sheriff's deed. The numerous objections to which, will be briefly considered and disposed of without stating them at large.

1. The two judgments for costs authorized the executions, levies and sale.

Though a sheriff's return does not show that in all respects he proceeded according to the deduction of the 28th and 29th sections of the execution law in regard to sales of land, (*Stat. Law*, 630) yet if the contrary does not appear positively, the sheriff's deed should not be excluded from the jury.

2. The levy, though not stated in the return or with all the specifications that might have been made, implies that the land was levied on as the property of the defendant in the execution, or claimed by her, although not so stated, and there is no doubt upon the return and other evidence, that it was the land now in contest.

3. Although the return does not show that the Sheriff proceeded in the sale as directed in the 28th and 29th sections of the execution law, (1 *Statute Law*, 650,) it does not show the contrary. And if this might be implied from the parol evidence afterwards introduced, such implication could not operate upon the question of the admissibility of the deed, because the evidence on which it may arise had not then been given; because, as a question of fact, it could not be positively assumed by the Court, even if authorized by the evidence, but should have been left to the jury; and because the failure of the Sheriff to cry the sale in the precise manner prescribed by the act, is an irregularity, which, though it might be proper ground for a motion to quash the sale, does not make it void, and is unavailable as a ground for avoiding it in this action of ejectment. We observe, however, that the failure is only matter of in-

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ference from the parol evidence, that if available in this action, it was for the jury to determine whether it existed as a fact, and that no instruction having been given or asked for on the subject, and the failure not having been so proved as to be now assumed, the verdict for the defendants must be considered as establishing the fact as the jury might have found it in favor of the validity of the sale.

A deed made by the deputy sheriff who made a sale of land in the name of his principal, is valid. The office of sheriff is one and the duties may be performed by either principal or deputy.

4. The deed made in the name of the principal Sheriff by the deputy who made the levy and sale, is deemed sufficient. The office of Sheriff, though executed by a principal and his deputies, is but one. The principal Sheriff, by his deputy, made the levy and sale. And we think he might either in person or by the same deputy execute the deed and pass the title, which never in fact vested either in the principal or the deputy, but was only subject to the power of levy and sale and conveyance conferred upon the Sheriff by the execution under the law, and to be exercised by him in person or by deputy.

The case of *Winslow* vs *Austin*, (5 *J. J. Marshall*, 408,) shows that it was considered to be a serious question whether, as the statute declares that in sales of land under execution, *the Sheriff* or other officer shall convey, &c., the principal Sheriff was not alone invested with the power to the exclusion of the deputy, and it seems to have been, in part at least, on the ground that the deputy, as well as the Coroner, may be referred to by the words *other officer*, that the powers of the deputy was established. Whether we might not consider the deputy as included under the description of Sheriff, rather than under that of 'other officer,' is not material. We fully concur in another principle asserted in the case referred to, namely, that there is a striking distinction between the execution of a naked power created by letter of attorney and the execution of official duties and powers conferred by law upon public officers. It would be especially prejudicial to the public and to all parties interested in sales under judicial authority, to apply to the merely formal acts done

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in execution of the powers conferred upon the officers entrusted with these sales, any subtle test or construction which might bring distrust upon such proceedings.

The process directed to the sheriff may be executed by him or by the deputy in the name of the principal—in whole or in part—the principal may sell land after the deputy has levied, or convey land after the deputy has sold.

As the execution is directed to the Sheriff, he, that is the principal, has the right to levy, sell and convey. His deputy, by virtue of his appointment as such, and of his being entrusted with any particular execution, has authority, in the name of the principal, or as his deputy, to do either of these acts. But as the principal might undoubtedly take the execution in hand after it had been received or even levied by the deputy, and go on with it to a final consummation by sale and conveyance, so we think he might at any stage assume and complete the execution of the power, and consequently, that either in person, or by his deputy, he might convey the land which the latter had sold.

Executions may issue to the county in which the judgment was rendered, or that in which the defendant resides: (*Stat. Law*, 646.) But though an execution issue not in conformity to statute, the sale is not void: (1 *Monroe* 94; 5 *Ib.* 479.)

5. The 20th section of the execution law, (1 *Statute Law*, 646,) does not require the execution on a judgment to be, in all cases, issued to the county in which the defendant resides. The statute expressly authorizes it to be issued to the county in which the judgment was rendered, as was done in this case, or to that in which the defendant resides, at the option of the plaintiff. Besides, even if the execution had been directed to a wrong county, this would not have made the sale void: (1 *Monroe*, 94; 5 *Monroe*, 479, *&c.*) As the plaintiffs in the judgments had a right to issue their executions to the county in which the judgment was rendered, the parol evidence showing that the defendant resided in another county where she had personal property to have satisfied the execution, was immaterial as to the validity of the execution sale and the deed, except so far as it might bear upon the question of fraud in the sale. As to which, no opinion was given by the Court, nor asked for by the plaintiff on the trial of this case; and as remarked upon another point, the verdict of the jury settles the question of fraud against the plaintiff.

6. The agreement among the plaintiffs in the execution that one of them should bid and purchase, was not

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of itself a matter of which the defendant in the execution had a right to complain. It certainly did not avoid the sale. And even if this and other circumstances in connection with the inadequate price for which the land, valued at $700, was sold, might conduce to establish fraud in the sale, there is direct evidence by the deputy Sheriff, who made it, that it was fairly and openly conducted in the court house yard, in the presence of a number of persons who might have bid if they had chosen; and as the jury was not bound to find the sale fraudulent, their verdict in its favor cannot be disturbed by this Court as being contrary to the evidence.

It is not sufficient ground to avoid a sale that the plaintiffs in the execution combined not to bid against each other, especially where the sale was open at the Court house on Court day.

7. The objection to the deed that it does not appear that the plaintiffs in the executions had been made defendants to the actions of ejectment, is like the others, wholly unavailing. The title of the record read to prove the judgments, names these persons as defendants, and the judgments are in their favor. If they were not, in fact, defendants entitled to judgment, the judgments should have been reversed, or the executions quashed. No advantage can he taken in this mode of a mere error in the judgments, if one existed. But none appears on the record of the judgments, and in the absence of the previous part of the record none will be presumed. Besides, if the tenants in possession, or others, had not been made defendants, there would have been no costs of the defence, and no appearance of the defendants would have been stated in the record of the judgments.

The foregoing objections to the judgments, though some apply to the admissibility of the deed, and others to the effect of evidence not affecting its admissibility, but which, if entitled to any effect, might have been considered by the jury as impairing its efficacy on the ground of fraud, have been disposed of in the order in which they are presented in the brief of the counsel. And as, in our opinion, they do not establish any error, either in the admission of the deed as evidence or in

The Court decide upon the effect and admissibility of a deed read in evidence, tho' not objected to, as necessary to reach the question whether a new trial should have been granted based upon the ground that the verdict was against law and evidence.

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overruling the motion for a new trial, there is no ground for reversing the judgment.

With respect to the plaintiff's right of recovery upon her own evidence in chief, we need only remark that as there is no intimation of any other title in the defendants but that derived from the deed of Barney Young, nor of any possession in them, or those under whom they claim prior to their respective deeds from Young's grantees, immediate and remote, the jury had a right to infer that the possession was acquired and transmitted under these deeds and under the title of Young, which, upon his death, vested, by operation of law, in his wife as the survivor, whose title was not transferred by the deed, nor by her relinquishment of dower. And as the title of Barney Young terminated absolutely at his death before that of his wife, his vendees held, after that event, as mere tenants at sufferance of the surviving wife, upon whom she might have entered without notice to quit, or at any rate upon reasonable demand of possession. And if such notice or demand were necessary, we are of opinion that the previous actions of ejectment, which the jury might have inferred were for the same land, constituted a sufficient demand of possession; and in the absence of any evidence of consent or permission on the part of the plaintiff, that the defendants should continue in possession as her tenants, dispensed with any other notice or demand. With the regard to the statute of limitations, twenty years had not elapsed from the death of Barney Young. The act of 1842, reducing the limitation to three years, had not passed when the action was commenced, and the act of 1809, limiting actions to seven years in the case of adversary titles, does not apply.

The jury, therefore, but for the deed transferring the title of Mrs. Young, before this suit was commenced, might have found for the plaintiff, and in this state of the case, it was necessary that we should decide upon the admissibility of that deed; and although there was no motion to exclude the deed, or for instructions as to the effect which the jury might allow to the facts to

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which the parol evidence was directed, it was also necessary to decide whether that evidence was of such a character as that the jury were bound to find against the deed.

As already shown, we are of opinion that the deed was properly admitted to be read in evidence, and that upon the whole case, the verdict is not against law and evidence, and, therefore, the judgment is affirmed.

Dunlap for plaintiff; *Bell and Fox* for defendants.

Berry *vs* Stockwell, &c.

CHANCERY.

ERROR TO THE FLEMING CIRCUIT.

Case 81.

Bills of Review. Waiver of Equity. Assignee and Assignor.

JUDGE SIMPSON delivered the opinion of the Court.

June 21.

THE first question that arises in this case is, whether Berry, as obligor, by his promises of payment to Stockwell, the assignee, made after the assignment, waived the equity which existed against the payment of the note assigned.

That the obligor obtained indulgence from the assignee without a contract therefor, is no waiver of an equity existing before the assignment.

There is no testimony of any contract for forbearance between the obligor and assignee, nor does it appear that the assignee sustained any loss or injury which was occasioned by the promises of payment made by the obligor. That the assignor was solvent at the time of the assignment, and became afterwards insolvent, was alleged, but it was denied, and there is no proof to sustain the allegation. The obligor, from time to time, made promises of payment, and was indulged by the assignee, without, however, any contract for indulgence having been made by them. If the indulgence was induced by the promises of payment, still, as the recourse of the assignee against the assignor was not impaired by the delay, as the latter remained in the

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BERRY vs STOCKWELL &c.

same condition he was at the time of the assignment, and liable, notwithstanding the indulgence granted by the assignee, inasmuch as the equity against the note existed at the time of the asignment, the assignee incurred no loss by the indulgence, and no contract for forbearance having been made, but the indulgence granted having been merely voluntary, the obligor is not precluded from relying upon his equity against the debt.

S held a note on —, with B his surety, and received in discharge thereof the note of B with the assignment of —. Held that the note on which B was surety was thereby extinguished, and could not be revived, though B had an equity against the note assigned by —.

The consideration of the assignment to Stockwell, consisted in part of a note held by him on the assignor for money loaned, to which note Berry, the obligor in the assigned note, was surety. For the amount of that note, which was surrendered to the assignor at the time of the assignment, it is contended that Berry, the surety should still in equity be held responsible to the assignee, if he be released from the payment of the assigned note.

When Stockwell, the assignee, took from the assignor the note on Berry, and surrendered to the assignor, in consideration of the assignment, the note he held on him and Berry as surety, the note last named was thereby paid off and satisfied, and Stockwell's remedy was upon the assigned note alone, first against the obligor, and if that failed, then against the assignor.

Suppose that Stockwell, when he gave up the note on the assignor and Berry, instead of receiving by assignment a note on the latter, had received from his assignor a note upon another individual, and that some available equity had existed against the note assigned to him, could he, after the lapse of some years, resuscitate his claim upon the note which had been paid off and surrendered, and hold Berry, the surety, responsible for the amount. It is evident that it could not be done. The liability of Berry, as surety, would have ceased. None of the remedies which the law affords to a surety for his protection, could have been resorted to by him, after the note upon which he was bound as surety had been surrendered to the principal. There is no substantial difference between the cases. Stock-

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well voluntarily gave up the note for the payment of which Berry was bound as surety. It was not done at the instance of Berry, nor under circumstances which can create any equity against the surety, whose liability as well as correspondent rights as such, ceased and determined by the arrangement. It was an act of the creditor and principal debtor, in which the surety did not participate, and which cannot be made to operate to his prejudice. Nor can his liabilty upon the note which was surrendered, be transferred without his consent, to the assigned note, so as to increase his original liability upon the latter, or preclude him from asserting any equity he may have against it. The assignee took it subject to all the equities to which it was liable, in the hands of the assignor; and the mistake under which he may have labored at the time, in supposing that he was risking nothing by the arrangement, as he would still hold a note binding the same individuals, one as obligor and the other by the assignment, cannot affect the rights of the surety, who did not induce the mistake or have any agency in the transaction.

The Court below, therefore, committed an error in rendering a decree in favor of Stockwell against Berry, either for the amount of the note on which he had been liable as surety, or for the amount paid by Stockwell to his assignor. Stockwell's only remedy was upon the assigned note, and that depended upon the contingency whether the equity of the obligor, Berry, would or not extend to the whole note.

The leave of the Court is not necessary to file a bill of review to correct a decree where the error appears on the face of the record.

The bill of review filed by Berry in this case to reverse and set aside that decree, should have been sustained. It being for errors apparent in the record, it was unnecessary to obtain leave of the Court to file it. The order of the Court directing the suit to be stricken from the docket was, however, prejudicial to the complainant, as the matters contained in the bill are sufficient to entitle him to a reversal of the decree sought to be reviewed, and he had a right to prosecute his suit for that purpose, which the Court refused to permit him to do.

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PAWLINGS vs McGLASSHON.

Wherefore, said order directing the suit to be stricken from the docket is reversed, and cause remanded for further proceedings consistent with this opinion.

Cord for plaintiff; *B. Porter* for defendants.

CHANCERY.

Case 82.

Pawlings *vs* McGlashon.

ERROR TO THE MASON CIRCUIT.

Parties in Chancery. Bankruptcy.

June 22.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Where it appears that a party is bankrupt, and the rights involved would belong to the assignee in bankruptcy, it should appear on the record that the assignee is cognizant of the proceeding; a supplemental bill in chancery cases, is one appropriate method of showing his claim of right; though it may be sufficient to state the fact on the record.

UPON the merits of this case, as between the actual parties, we think the decree is right; and we should not disturb it, upon this writ of error, were it not that McGlashon, the complainant, having been declared a bankrupt, during the pendency of the suit, his assignee is, by operation of law, invested with the legal title to the claim set up in the bill, and was entitled to the benefit and control of the suit, unless the complainant, as he alleges, but does not prove, had parted with the beneficial interest in it before the title passed to the assignee. If no such allegation had been made, it might have been sufficient to note on the record the fact of bankruptcy, and that the suit was prosecuted by the assignee, or for his benefit, though, even in that case, if the bankruptcy appeared in the suit at all, it would be more proper that the assignee should assert his claim by supplemental bill, or other regular pleading. But in this case the complainant, admitting the proceedings in bankruptcy, and his discharge during the pendency of the suit, alleges that before the decree vesting his rights in the assignee, he had surrendered this claim upon an attachment, and that since the said decree, he had re-purchased this claim in the proceedings under the attachment, and with means acquired since the decree in bankruptcy; and the final decree in the present case, directs the commissioner appointed to make sale for satisfaction of the claim, to take the sale bond payable to the com-

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plainant. This decree is objectionable as being a decision against the right of the assignee without his being a party and without proof. But it is more objectionable, inasmuch as it leaves the debtor still subject to the claim of the assignee, who, being no party, is not bound by the present decree.

In this case we are clearly of opinion that the fact of bankruptcy having been pleaded by the defendant and admitted by the complainant, who sets up a claim adverse to that of the assignee, it was necessary, before the fund should be finally disposed of, that the assignee should have the opportunity, as a party, to assert his right and contest the claim of the complainant, and that the suit should be in such a condition as to protect the defendants against a re-payment to the assignee, and against the necessity of litigating his right in another suit. The assignee being a non-resident and no party, there can be no presumption that he admits or acquiesces in the complainant's alleged right against him.

It was not necessary, however, and is not now necessary that the sale should be postponed until the final decision of the right between the complainant and the assignee. If it should appear to be necessary or advantageous to make a sale without delay, it might be done, and the proceeds applicable to the present demand, being, as they should be, brought into Court, might then abide the decision between the complainant and the assignee, in which the debtors have no other interest, but that it shall be a conclusive protection to them.

Wherefore, the decree is reversed, and the cause remanded, with directions to allow the complainant an opportunity to make his assignee in bankruptcy a party to this suit, and for further proceedings thereon, or to dismiss his bill without prejudice, should he fail to bring the assignee before the Court.

Lindsey for plaintiff; *Hord* for defendant.

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Commonwealth *vs* Shanks.

MOTION.

Case 83.

ERROR TO THE LINCOLN COUNTY COURT.

Guardians. Attorneys' fees. Costs. Practice.

JUDGE GRAHAM delivered the opinion of the Court.

June 22. THE defendant who was statutory guardian of Sublett, was, by order of the County Court, summoned to appear before them to show cause why he had not returned an inventory of the estate of his ward, as required by law. He made his report at the November term, and then the Court dismissed further proceedings at defendant's costs, *including* an attorney's fee. At the ensuing January term, the Court, on defendant's motion, quashed the execution which had been issued against him for the costs, and directed that the attorney's fee of two dollars and fifty cents be *excluded* from the taxation of costs.

The County Court has no power to correct its judgments after the term is at an end.

The propriety of making and rescinding the order or judgment, and particularly of taxing as costs an attorney's fee in the case, is now to be determined. The order or judgment, made at the November term, was a final order; nothing was left open for the future action of the Court, and no power was reserved to change or modify the judgment. If an execution had been issued, not authorized by the judgment, the Court could, at a subsequent term, have quashed the execution, or quashed the taxation of costs if it had been improperly made up by the Clerk, but they had no authority to correct their own final judgment, after the close of the term at which it was made. If the order of January was now only before this Court, the judgment would have to be reversed, but as the defendant has assigned cross-errors, and thereby brought before this Court for revision the judgment at November term, if this was not authorized by law, then the last and rescinding or-

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der was not to the prejudice of the plaintiff. We are, therefore, to investigate the propriety of the judgment at the November term. "If a guardian fails to deliver an inventory of his ward's estate, he shall by order of the Court to which he is amenable, be summoned, and if he remain in default, be compelled to perform his duty or be displaced. The summons to be issued by the Clerk and executed by the Sheriff:" (1 *Statute Law*, 769.)

The Clerk's and Sheriff's fees incurred in proceedings against guardians directed by the statute (1 *Stat. Law*, 769) are not a part of their *ex-officio* services, but chargable to the guardian if found delinquent.

Although this proceeding is in the name of the Commonwealth, yet it is instituted for the benefit of the ward, whose interest it is the duty of the Court to protect. We are of the opinion that the Clerk's and Sheriff's fees, in such cases, are not embraced in the public services for which each of these officers is to be allowed a sum not exceeding forty dollars per annum: (1 *Statute Law*, 689, 691.) The section (691) allows to the Sheriff this sum for all public services, to-wit: "attending Court of Claims, serving all *public* orders of Court except against guardians, where they shall stand out in contempt, to be charged to such guardians," &c. Contempt is a disobedience of the rules and orders of Court, and is punishable as an offence against the public.

If, in case of contempt, the Sheriff's fees are to be taxed against the guardian, we think they should be when the proceedings are had against him, not for a public offence, but for a dereliction of duty to his ward. The Clerk and Sheriff performed services by direction of the Court, whose orders were made in obedience to the law. It was not erroneous to require the defendant to pay, as costs, the amount of their fees.

The County attorney has no right to any tax fee in such cases, he is paid by a tax levied upon the county for his services: (1 *Stat. Law*, 169) He has a right to fees in certain cases: (2 *Stat. Law* 1382.)

The county attorney does not occupy the same attitude. "For his services he shall receive such compensation as the Court shall deem reasonable, which is to be included in their county levy, and paid over to him when collected:" (1 *Statute Law*, 169.) By subsequent acts of the Legislature, fees are allowed him in certain cases, not, however, embracing such a case as this: (2 *Statute Law*, 1382.) But if the failure of the guardian to return an inventory of his ward's estate,

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could be held to be a public offence, the act of 1816, (1 *Statute Law*, 541,) forbids the taxation of a fee to the attorney. It seems to us that in the order made at November term, directing an attorney's fee to be included in the taxation of costs, the Court erred, and so much of it as so directs is reversed on the cross-errors assigned by Shanks, and the cause remanded with directions to that Court to correct their order as herein indicated. The order of January, though erroneous, was not prejudicial to the plaintiff in error.

A party cannot complain of an error by which he is not prejudiced.

J. Harlan, Attorney General for Commonwealth; *Fox* for Shanks.

TRESPASS.

Case 84.

Allen, &c., *vs* Feland.

ERROR TO THE LINCOLN CIRCUIT.

Trespass. Justification under Process. Instructions.

June 25. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action of trespass was brought by Feland against Allen, McRoberts, Rowland and Walker, for entering the close of the plaintiff, and taking a negro woman and her child, his slaves. The defendants pleaded the general issue, with leave to give in evidence any special matter that might be pleaded. And the jury having found for the plaintiff $650 against Allen and $200 against McRoberts, and having found Rowland and Walker not guilty, Allen and McRoberts moved for a new trial, which was refused; and the plaintiff moved for a new trial as to Rowland and Walker, which was also refused, and a judgment having been rendered in conformity with the verdict, the defendants Allen and McRoberts prosecute a writ of error to reverse the judgment against them, and the plaintiff, in case of a reversal on that writ, asks for a new trial as to Rowland and Walker, to the refusal of which in the Circuit Court he had excepted.

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A plaintiff who brings a joint action of trespass against several defendants and obtains a verdict against part only of the defendants cannot have a new trial of so much of the case as relates to the defendants who were acquitted, without a *nolle prosequi* being entered as to the others.

But in such case the defendants who are found guilty may ask a new trial as to themselves without joining those defendants who were acquitted by the jury.

But the plaintiff having brought a joint action against all of the defendants for the same trespass, and the trial having been joint, he could not, at his option, sever the defendants except by entering a *nolle prosequi* as to some of them and retaining his action as to others. And although the jury found against two of them and in favor of two others, the plaintiff could not, at his election, hold on to a verdict and judgment against the two former, and repudiate the verdict in favorof the other two, but was bound to acquiesce in the verdict *in toto*, or to ask for or agree to a new trial of the whole case.

The condition of the two defendants who were found guilty is different. The case of the other defendants did not depend upon theirs. They had no right to bring the others again in jeopardy, or in any manner to control them or their case; and yet they had a right to relieve themselves from the verdict against them, if they were unjustly or illegally convicted. Their motion for a new trial, as to themselves alone, was therefore admissible. Moreover, as the other defendants are no parties to their writ of error, and their is no writ against them by the plaintiff in the action, they are not in any manner before the Court, and the judgment in their favor could not be reversed, and being in fact a separate judgment, it does not fall of course with the other. The case before us is, therefore, the separate case of Allen and McRoberts, and the question is whether there is any error in the proceedings to their prejudice.

It appears from the evidence that the two slaves in question certainly belonged to Allen at one time; that he had put them in possession of his daughter and her husband shortly after their marriage; that the defendant claimed them by title derived from the husband, while Allen claimed that they belonged to him at the time of the taking complained of; and that in assertion of his claim he had authorized Rowland to sue for and recover them in his name; that Rowland sued out a writ of replevin in the name of Allen, who was in another county and sick; and that Rowland, together

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with Walker and another, accompanied McRoberts, to whom, as deputy Sheriff, the writ had been delivered, and the two slaves were, without any resistance or personal injury, taken from the house of Feland by the party. The evidence conduces to prove that this was done in execution of the writ of replevin. But that writ, though actually returned to the office from which it issued and found among the papers of the suit, had no endorsement or return made upon it. And the record of that case shows that on motion of the plaintiff's counsel the suit was dismissed without any judgment, either for a return or for costs. A plea to the action of replevin appears to be among the papers not filed of record, and it is proved by parol that when Feland's attorney offered to file it in Court, the plaintiff's attorney insisted that Feland was not before the Court and dismissed the suit. It appears further that on the day after the slaves had been taken from Feland's possession, they were in the possession of Rowland who was carrying them away on horses. What afterwards became of them is wholly matter of inference or conjecture.

Upon the question of fact whether Allen had given, or merely loaned the negro woman to his daughter, we have nothing to say, except that while the circumstances enumerated in the third instruction conduced to prove a gift as therein stated, there were other circumstances which the jury had a right to consider as tending the other way; and it could not be assumed by the Court that there was in fact a gift, or that the woman and her child did not belong to Allen when they were taken from Feland's house.

One whose property is upon the premises of another has a right peaceably to enter and take it. That he entered with an officer who had a writ of replevin to take and deliver the property did

If they did belong to him, the possession under claim of adverse title was wrongful, and Allen, by himself or agents, had a right to enter peaceably upon Feland's premises and regain the possession peaceably; and the resort to a writ of replevin and to the agency of the Sheriff for that purpose, did not make the entry and seizure a trespass, whether the writ was returned or not. The first instruction given, on motion of the

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plaintiff, implies that although Allen may have been the owner of the slaves, entitled to their immediate possession—and although Feland's posessession may have been wrongful—yet something more was necessary to authorize the entry and seizure; that is, it leaves to the jury to determine whether there was proper authority for the entry and seizure without informing them what would or would not justify these acts, and without, in any manner, referring to them the question of property as claimed by the parties. It was not necessary, so far as the entry was concerned, and if its purpose was lawful, that the defendants should have had any previous license from Feland, or any other permission than a failure to prohibit them. We, therefore, consider this instruction to the effect, that if the jury believed the defendants entered, &c., and took the slaves *without leave or proper authority*, they must find for the plaintiff some damages, as being misleading and erroneous.

not make it a trespass whether the writ was ever returned or not. No license to enter in such case is necessary, other than a failure to prohibit the entry.

The second instruction, in substance, tells the jury, that if the defendants entered under color of process of law, and by virtue of the writ obtained the possession of the slaves, and the writ was not returned executed and with a statement of what was done under it, but was abandoned by them, it affords the defendants no protection, but in contemplation of law, they are trespassers from the beginning. This instruction, like the first, withdraws from the jury the question of property and gives no effect to the evidence on that subject. It assumes further that the failure of the deputy sheriff to return a statement of his proceedings under the writ, not only deprived him of any justification which it might otherwise have afforded him, but that it had the same effect with regard to all of the defendants. As the deputy Sheriff had a right to return the writ, and it was his duty to state upon it his proceedings under it, we are of opinion that his failure to make such return, precludes him from justifying under the command of the writ: (1 *Salkeld*, 408, 409, 410; *Watson on Sheriffs*, 63; 7 *vol. Law Library*, 46.)

An officer having process, can not justify under such process unless he return it, with his endorsement of his acts under it, nor can the plaintiff in the writ, if he be instrumental in preventing such return being made: (1 *Salk.* 408, *Watson on Sheriffs*, 7 *vol. Law Lib.*, *page* 63) unless the defendant assented also. Not so with those who acted by the authority of the officer under the writ.

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We are also satisfied that if the failure to make the return was caused by the directions of the plaintiff in the writ, that it affords him no more protection than it affords the Sheriff, unless the direction was given with the assent of the defendant in the writ. And the case, instead of being mitigated, is aggravated, if, after resorting to the writ as a means of gaining the possession, Allen, not being the owner of the slaves, directed or assented to the failure of the Sheriff to make a proper return, in order that he might retain the advantage gained without incurring the obligations incident to the action of replevin. And although there may be ground for the inference that such was his conduct and motive in this case, the inference is not so conclusive as to authorize its assumption by the Court. Of the bearing of this instruction upon the case of the other defendants, it is unnecessary to take notice as their case is not before us. But we are of opinion that it is erroneous and misleading in determining absolutely that Allen, as well as McRoberts was precluded from relying on the writ by reason of the omission of the latter to make due return on it. The abandonment of the suit by Allen is only a circumstance from which his assent to this omission, and his taking advantage of it for his own benefit may be inferred. The act of his attorneys in dismissing the action of replevin, was his act, so far as that suit was concerned. But the motives or consequence of the dismission, and the state of the possession of the slaves, at the time, are not shown, and are but matters of inference.

A plaintiff in replevin is not liable as a trespasser, though the Sheriff fail to return the writ, and the suit be dismissed after he has received the property at the hands of the Sheriff—unless he directed or assented to the act of the officer, in

If Allen was the true owner, entitled to the possession, he is not liable as a trespasser, though the writ of replevin was not returned, and the action was abandoned. If he was not the true owner, but in good faith believed that he was, and resorted to the action of replevin to assert his right, the failure of the Sheriff to make return, &c., does not make Allen a trespasser, nor deprive him of the protection of the writ, unless he was implicated in the Sheriff's failure, as above supposed.

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Wherefore, the judgment is reversed, and the cause remanded for a new trial.

J. & W. L. Harlan for plaintiffs; *Bell* for defendant.

not making the proper return upon the process.

Dobyns &c. *vs* Schoolfield, &c.

EJECTMENT.

ERROR TO THE BRACKEN CIRCUIT.

Case 85.

Limitations. Heirs.

JUDGE SIMPSON delivered the opinion of the Court.

June 25.

THIS action of ejectment was brought by the heirs at law of Mary S. Dobyns, to recover a tract of land that had been conveyed to the defendants, or those under whom they claim, by deeds purporting to have been executed by her and her husband during their lives, but which had not been so authenticated as to pass her title, she being the owner of the land.

The case stated.

The mother of the lessors of the plaintiff died in 1821, and her husband died in 1837. He had an estate during his life, as tenant by the curtesy, and that interest having passed to his vendees, they had a right to retain the land in contest in their possession until his death occurred.

This suit was not commenced until the year 1848. At the time of their mother's death, Elizabeth, one of the children, was an infant, and married before she attained the age of twenty-one. She was still a married woman when her father died in 1837, and also at the time this suit was commenced. The other heirs, except Rebecca, were not laboring under any disability when their father died, and Rebecca, who was then an infant, had arrived at full age more than three years before the present suit was brought. The only question is whether, under these circumstances, the disability of coverture, under which one of the heirs at law labored at the time her father died, will save her right in the land, from the operation of the limitation of three

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years under the statute of 1840: (3 *Statute Law*, 413.)

It is contended that the statute in allowing time, after the removal of the disability, to the heirs who are laboring under coverture, lunacy, or infancy, applies to such disabilities as the heirs are laboring under at the death of the feme; and as Elizabeth was an infant at her mother's death, and that disability had been removed more than three years before the action was brought, that she cannot rely upon a subsequent disability to bring her within the saving of the statute.

But such a construction of the statute would render its provisions in favor of those laboring under disabilities, in a great degree, inoperative, where the feme dies before she becomes discovert. The language of the proviso is not as clear as it might be, yet, according to any rational interpretation of it, the disabilities alluded to must be such as exist at her death, when that occurs after she becomes discovert and before the time has run out for her to sue, and such as exist when the right of her heirs to sue accrues, when she dies before she becomes discovert. The Legislature certainly did not intend such disabilities as the heirs might labor under at their mother's death when, at that time, they had no right to sue for the land, but such right was postponed until the death of their father, he being during his life tenant by the curtesy. And as it was the evident intention of the Legislature to make provision for those heirs laboring under the disabilities mentioned, in both of the cases specified, such an exposition should be given to the statute as would best tend to promote that object.

By the statute of 1840: (3 *Stat. Law*, 413) the limitation commences to run from the time the right accrues and not before.

According to this construction of the statute, as Elizabeth labored under the disability of coverture when her right to sue accrued, and that disability was not removed when this suit was commenced, she would, if she were the sole heir of her mother, be within the operation of the proviso, and not affected by the limitation. But we do not deem it necessary to decide what the true construction of the statute is, so far as it bears

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upon this question, because, for another reason, her disability does not save her right from the effect of the limitation.

To save the right of heirs of a *feme covert*, to recover lands which she during coverture had attempted, though ineffectually, to convey, all the heirs, and not part only of them, must labor under disability at the time the right to sue accrues, or the suit must be brought in three years: (*Phillips* vs *Pope's heirs*, *ante* 174.)

The proviso in describing the persons whose disabilities may postpone the commencement of the limitation, does it in language which imports that all the persons entitled as heirs, must be under disability to prevent the application of the bar created by the statute. It is only where the heirs, collectively, are under disabilities that they are embraced by the language of the proviso. In this respect it is analagous to the saving contained in the general statute of limitations of 1796, and should receive the same construction: *Phillips* vs *Pope's heirs*, (*ante* 174.)

As all the heirs did not labor under disability in this case, it follows that the statute operated as a bar, and that none of them could recover.

Wherefore, the judgment is affirmed.

Robertson, Hord and J. & W. L. Harlan for plaintiff; *McClung & Taylor* for defendants.

Oden *vs* Elliott's Executor.

ASSUMPSIT.

APPEAL FROM THE NICHOLAS CIRCUIT.

Case 86.

Assumpsit.

JUDGE GRAHAM delivered the opinion of the Court.

June 25.

THIS is an action of assumpsit by Williams, executor of Elliott, deceased, for money paid, laid out, and expended by the plaintiff for the use of the defendant. The trial was had on the pleas of non-assumpsit, and non-assumpsit within five years.

Case stated.

In the year 1842 an action of covenant was brought by Alexander against Hornbeck, in which Thomas Elliott, now deceased, was the plaintiff's attorney. Judgment was had, execution issued and replevied, and on the 22d September, 1842, execution on the replevin bond was issued and made returnable in November fol-

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lowing. Oden, the defendant in this action, was then an acting deputy Sheriff. The execution was placed in his hands, and returned by him "satisfied," no date being given to the return, or endorsement on the execution.

Elliott, the attorney for Alexander, died, according to the proof, early in the year 1843. Sometime in the year 1848 (the precise time not stated) Williams, the executor of Elliott, paid to the agent of Alexander the principal, interest and costs of the judgment against Hornbeck, amounting, at the time of payment, to about the sum of $190. On the 31st October, 1848, this action of assumpsit for money paid, laid out and expended by plaintiff for the use of the defendant, was brought by the executor against Oden. Upon the trial a verdict was rendered for plaintiff and judgment against the defendant for the sum of $82 in damages. The defendant has, by appeal, brought the case to this Court. Neither party asked instructions to be given to the jury and none were given by the Court. So far as the record shows, the jury were left to determine the law as well as the facts of the case without the aid of instructions from the Court.

Is a deputy sheriff who receives money on execution liable to plaintiff in assumpsit for the same?—*quere.*

Several questions have been raised by the assignment of errors, and argued by the counsel. The question which has been chiefly argued by them, is whether this action is maintainable against a deputy Sheriff. For an official non-feasance of a deputy, we suppose the doctrine is well settled, that the action must be against the principal Sheriff, and not against the deputy. Whether this case comes within that principle, or whether the deputy who fails to pay over money collected by him on execution, may be sued in assumpsit, not as an officer, but as any other person might be who has money in his hands belonging to another and fails to pay it over, is a question which we, for the present, waive, not deeming that it is necessary to be decided in this case.

There is not a shadow of evidence that Oden ever requested Elliott, during his life, or his executor since

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Where money is paid by one not in obedience to any request, nor in discharge of any legal liability to do so, no action can be maintained against the person for whose benefit it has been paid.

his death, to pay the money collected by him on the execution. We suppose the money was paid by the executor, because of some supposed liability of his testator. Such liability may have existed, although the facts proved on the trial in this cause, do not show how an attorney, who died very shortly after an officer had collected money for his client, can be held responsible to the client for the failure of the officer to do his duty. There was, we have said, no express request from the defendant to Elliott, or to the plaintiff, to pay the demand, and no express promise to pay the executor of Elliott after the payment was made by him. Do the facts of the case raise an implied request or an implied assumpsit? The money, as the proof shows, was, as to the greater part of it, collected in the year 1842, and the whole residue of it in January 1843. This action was not commenced until October 1848, more than five years after Alexander's cause of action accrued against the defendant. To a recovery in an action of assumpsit by Alexander, if he had brought this suit, the statute of limitation was a complete bar.

This suit is brought because of the payment by Williams, and is not barred by time, if that payment gives a cause of action. Can the present plaintiff maintain the action? Is there such an implied request or assumpsit arising from the facts, as would make the defendant liable to him? Neither the testator, Elliott, nor his executor, Williams, was under any obligation whatever to pay this debt for Oden. No such duty to Oden, devolved on either of them. There was not any privity between Oden and the plaintiff, or his testator. Neither was he his surety, nor liable at all for his acts or his defalcations or failure to discharge his duties. Although, as said already, the facts in this case do not show any liability on the part of Elliott, yet it is possible that his undertaking with Alexander may have been of a character to make his estate liable; but if so, it must have been because of his own neglect, (if he did not in fact collect the money of Oden, as is stated by one witness he did,) and not because of Oden's conduct. It seems to

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us that there is nothing in the facts of this case to sustain the plaintiff's action, and consequently that the verdict and judgment ought to have been for the defendant and not for the plaintiff.

The judgment of the Circuit Court is, therefore, reversed and cause remanded, with directions to set aside the verdict and judgment, and grant the defendant a new trial, on payment of costs, and for other proceedings not inconsistent with this opinion.

J. & W. L. Harlan for appellant; *G. Davis* for appellee.

ASSUMPSIT, *Case* 87.

Daniel *vs* Nelson.

APPEAL FROM THE CLARKE CIRCUIT.

Witness. Evidence. New trial.

June 25. JUDGE GRAHAM delivered the opinion of the Court.

The case stated.

THIS is an action of assumpsit by Harvey G. Nelson against Jesse Daniel and William H. Nelson to recover for services rendered, labor and money expended, &c., upon a certain farm called "Hickman" of the defendants. The trial was had on the plea of non-assumpsit by defendant Daniel. We gather from the evidence introduced by Daniel, that one of the grounds of his defence to the action was that the plaintiff was a partner in the farm, or at any rate was to be compensated for his services by receiving a portion of the crops raised on the farm. A deposition of William H. Nelson, one of the defendants, given in a chancery suit pending between these parties, was, by permission of the Court, read to the jury on the part of the plaintiff. In this deposition he states that the plaintiff was not a partner in the farm, but on the contrary was, by contract made with the witness, to be paid a reasonable sum for his services, &c. This deposition seems to have been taken after the partnership between the defendants had been

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dissolved, and after the plaintiff had notice of such dissolution. The defendant, Daniel, objected to the reading of the deposition as evidence against him, but the Court overruled the objection.

Though the verdict of the jury might have been the same if improper testimony had not have been given, yet if the improper or illegal testimony was improperly admitted, and may have influenced the jury, the verdict will be set aside.

Although, if this deposition had been rejected and the jury had found the same amount of damages which they have rendered in their verdict, we might not have felt authorized to disturb it, yet we cannot say that the jury were not very much influenced in their verdict by this statement of William H. Nelson, nor that they might not reasonably have hesitated on the other testimony, before they would have found for plaintiff, as they have done. We think it is, therefore, necessary to determine whether the Court did right in not rejecting the deposition.

The witnesses, who on the trial deposed on the part of the plaintiff, prove that the plaintiff lived upon and superintended the "Hickman farm," and state their opinion of the value of his services. None of them state the terms upon which he undertook the superintendency of the farm. The witnessess on the part of the defendant, Daniel, prove the declarations of the plaintiff. One says plaintiff stated that he had purchased that place in partnership with his brother William, but subsequently yielded his purchase. Another proves that plaintiff said he was to have half the hemp raised on the farm, and that was the principal crop. Another states that the plaintiff claimed and received one half the hemp raised on the place; and another states that plaintiff sold one half the hemp, and said it was partnership property.

We have been thus particular in stating the evidence on this the main branch of the controversy, so that the principles of the law of evidence may the better be applied to the statements of the defendant, William H. Nelson. He was not sworn as a witness on the present trial, but his deposition taken from a chancery suit of himself against defendant Daniel, the deposition having been taken on the cross-bill of said Daniel against William H. and Harvey G. Nelson, was read as evi-

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dence on the trial. This deposition was, therefore used as containing admissions made by one defendant and late partner, to affect the interest of his co-partner and co-defendant. He states that the plaintiff never was a partner of the defendants in this suit; that the defendants were the sole partners in said farm, and the plaintiff was employed by the said William to attend the farm, and was to be paid for his services, and Daniel afterwards approved of the arrangement.

There are but few principles of evidence upon which there has been more conflicting opinions of Courts than upon the question of the competency of such statements.

The English authorities state, broadly, "that an admission made by one of two partners, after the dissolution of the partnership, is competent evidence to charge the other partner:" (*Chitty on Contracts*, 261; *Gow on Part.*, 81, 214; 3 *Starkie*, 1074.)

This same principle has been sanctioned by several of the Courts in the United States. These cases relate almost exclusively to admissions of one partner to take a case out of the statute of limitations. Other Courts of this Union have dissented from this doctrine: (1 *Peter*, 373; 3 *Johns.* 536; 15 *Johns.* 409; 3 *Mun.* 191; 4 *Mun.* 215.)

The admissions of one partner, after the dissolution of the partnership, is not competent to prove a debt to charge the other partner. (1 *Marsh.* 189; 6 *J. J. M.* 614; 3 *B. Monroe*, 266)

This Court has, on several occasions, sanctioned the latter doctrine. The admissions of a partner, after the dissolution of the partnership, is no evidence against the firm: (1 *Marsh.* 189; 6 *J. J. Marsh.* 614: 3 *B. Monroe*, 266.)

In the case of 3 *Mun.* 197, the Court said, "that although the acknowledgement of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations in an action brought against the firm; the *existence* of the debt being *first* proved by *other* testimony, or admitted by the pleadings; yet that such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners."

In the case now before this Court, the existence of the debt, as claimed by plaintiff against the defendants,

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was the sole matter in contest. And although other evidence had been introduced tending to prove the plaintiff's demand, yet their evidence, rebutted as it was, to some extent at least by the defendant's witnesses, did not render the admissions of W. H. Nelson unimportant. It was calculated to make a decided impression on the minds of the jury, and may and probably did, to a considerable extent, influence them in their verdict. The question before us is, should the Court have sustained the defendant Daniel's objection to the introduction of the deposition? Upon a careful consideration of the authorities on the subject, we are unable to perceive any sufficient reason to justify us in now departing from the former adjudications of this Court. If the question were, for the first time, presented to this Court, we might perhaps, in view of the conflicting opinions of other Courts, have some hesitation upon the propriety of rejecting such admissions; but whether we should so hesitate or not, we think the question ought to be regarded as settled by decisions and long recognized practice of this Court, to which we have referred.

We are of opinion that the Court erred in not sustaining the defendant's objections to the admission of W. H. Nelson's deposition as evidence in this cause, and that a new trial ought to have been granted to the defendant, Daniel, on his motion,

The judgment of the Circuit Court is, therefore, reversed, and the cause remanded to that Court, with directions to set aside the verdict and judgment, and award to the defendants a new trial, and for other proceedings not inconsistent with this opinion.

Daniel and Eginton for appellant; *Hanson* for appellee.

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CHANCERY.
Case 88.

Coleman *vs* Wooley's Executor.

ERROR TO THE FAYETTE CIRCUIT.

Femes covert. Separate estate. Attorney's fees.

June 26. JUDGE GRAHAM delivered the opinion of the Court.

Case stated. THIS suit was instituted by Wooley setting up in his bill several demands against Mrs. Coleman, and particularly a claim of five hundred dollars as a fee for defending, at her instance, her son, who was charged with having committed murder. The other claims of Wooley are but slightly resisted.

The proof very clearly shows that Wooley was employed by Mrs. Coleman to defend her son; that he, as the lawyer of the accused, attended before the examining Court and at one term in the Circuit Court, but previous to the trial on the indictment, he had accepted the appointment of Judge, and of course did not further defend young Coleman. At the time of Wooley's employment in the defence, R. Wickliffe, Jr., was his associate and partner in the practice of law, and defended the accused on the final trial. It is proved by other counsel, who aided in the defence, that Wickliffe made an able defence, and his client was acquitted. It is proved that the fee charged by Wooley is reasonable, and such as is usually made in such cases.

Before and at the time of the contract, and until after the commencement of this suit, the defendant was a married woman, but for many years, although not divorced, had been living separate and apart from her husband. The separation continued during the life of the husband. By a deed from her father, and by his last will she was the owner and in possession of a large estate in land and slaves and some personal estate, held in the name of trustees for her separate use.

No express agreement was made by the parties to the contract, that a lien should attach to her estate, or

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that it should be subjected to the payment of any of Wooley's demands. She had for many years acted as a *feme sole*, and by her own means and exertions nurtured and educated her children, wholly unaided by her husband. She contracted debts as a *feme sole*, and was looked to for payment of her debts and performance of her contracts. The most important enquiry in this case is, whether this separate estate can be, in equity, subjected to the satisfaction of the complainant's demands.

As a general rule, a married woman cannot, except in special cases, contract as a *feme sole*, nor as such, sue or be sued, and cannot at law bind herself by any contract in regard to her seperate property. In conformity with this doctrine of disability, Courts of Equity hold that her *general* personal engagements will not affect her separate property. If she does no act indicating an intention specifically to charge her separate estate with the payment of her debts. A Court of Equity will not ordinarily entertain jurisdiction for an application of such estate, in the hands of her trustees, to such purposes during her life: (2 *Roper on Husband and Wife*, 236, &c.; 2 *Vesey, jr.* 138.) In equity, although she be permitted to possess and enjoy separate estate as a *feme sole*, yet those Courts holding, in analogy to the legal doctrines, that a wife's general engagements are not binding, refuse to entertain jurisdiction, at the instance of her general creditors, to subject her separate property in the hands of her trustees to their demands; but she may alien or encumber her separate estate when she shows an *intention* so to dispose of it: (2 *Roper*, 240.) But if a married woman be known to be living upon separate property and apart from her husband, it is generally inferred that her dealings with tradesmen and others who trust her, take place on the credit of this property, 2 *Roper*, (*in note*,) 244, and authorities there referred to. The foregoing principles are not in conflict. The distinction or difference in principles is this: "When property is limited to the wife's separate use, and she cohabits with her husband, the creditor has the husband's security for payment of

As a general rule, a married woman cannot contract as a *feme sole*, nor as such sue or be sued, and cannot at law bind herself in regard to her separate property. And a court of equity will not ordinarily entertain jurisdiction to apply her separate property in the hand of a trustee to the payment of her engagements: (2 *Rop. on Husband and Wife*, 236; 2 *Ves.* 1838.) Though she may charge her separate estate alone, when she shows an intention to do so: (2 *Rop. supra*. 240.)

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COLEMAN vs WOOLLEY'S EX'R

the debt contracted by the wife for necessaries; it is but just, therefore, to require some evidence of an agreement between her and her creditor, that her separate estate should be applied to the satisfaction of his demand.

If a married woman live separate from her husband, it is generally inferred that her dealings with those who credit her is upon the credit of her separate property: (2 *Roper*, 244,) and the creditors may subject it in equity: (*Ib.* 306.)

But when husband and wife are living separate, and, as may be inferred, she deals and is trusted on the credit of that estate, her separate creditors may maintain a suit in equity to subject it: (2 *Roper*, 306.) And, certainly, whenever the wife's intention appears, or may be inferred, to charge her separate maintainance with a debt for necessaries, it will entitle the creditor to have his debt out of the fund provided for such maintainance: (2 *Roper*, 306–9.)

The employment of counsel by a *feme covert* living separate from her husband, to defend her son against a charge of murder: held to be such a meritorious claim as would authorize the Chancellor to decree its payment out of her separate estate.

In this case, although the debt created to Wooley was not for necessaries, in the strict legal sense of the word, yet it was for services and labor bestowed at her instance for the benefit of a son, and to save him from the hands of the executioner, or at least from incarceration for years in a pententiary. It is a meritorious claim. But besides these considerations, Mrs. Coleman, in her answer (after denying the justice of Wooley's claims) says: "If she ever agreed to become personally responsible for any fee to him, and if also he can show that he performed any valuable services in the defence of her son, she would agree to pay him whatever the service was reasonably worth." Again she says in her answer, if she does owe complainant any thing, "she is able and willing to pay it." After making these admissions, she "respectfully submits to the Court whether her beneficial interest, in the hands of her trustees, could be subjected to any such demands." From the principles already adverted to, we think it can be and ought to be so subjected. So far as she resists the payment of the fee to Wooley because he did not give his personal attention to the case of her son during its entire progress in the Circuit Court, we are of opinion that where one of a firm is employed, and the business is attended to by either in a skilful and proper manner, and the party derives from the employment all the ad-

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vantages he could have received by the co-operation of the other, the payment cannot be resisted because circumstances rendered it impracticable for the one specially employed to attend to the case. In this case it is proved that Wickliffe skilfully and successfully defended the son, and did all that Wooley could have done in his defence. We see no reason why any portion of the fee should be deducted.

Where partners in the practice of law are engaged to perform service, and one of them only attends to the business, and it be skilfully and successfuly conducted, there is no ground for any abatement of the fee.

The other claims of Wooley, allowed by the decree of the Circuit Court, are sustained by her own written obligation, and by record, and by parol proof. We do not perceive any error in the decree to the prejudice of the appellant. Nor do we think that Wooley (who has assigned cross-errors) has any just cause of complaint. No greater credit has been given to Mrs. Coleman for the hire of her negro woman, than Wooley, in one of his letters to her, admitted he was willing to pay.

The decree of the Circuit Court is, therefore, affirmed on the appeal of Coleman, and on the cross-errors assigned by Wooley.

Pindell for plaintiff; *Robison & Johnson, G. B. Kinkead and Sayre* for defendant.

Divine and Brown *vs* Steele.

CHANCERY.

ERROR TO THE WOODFORD CIRCUIT.

Case 89.

Insolvents. Trusts. Equitable interests.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 27.

The case stated.

STEELE having a judgment against Divine, on which an execution had been returned "no property found," filed this bill to obtain payment of his debt by appropriating thereto the rent of a building erected under the following circumstances: Divine being largely indebted, conveyed his property to trustees for the payment of certain debts, not including the demand of the complainant. Brown acquired the equity of redemption or

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DIVINE & BROWN TO STEELE.

a right to the trust property which should remain after paying the trust debts. Divine continued to occupy, as a tavern, a house and lot in Versailles, and during the pendency of the trust he, with the consent of the trustees and by the request of Brown, erected with his own means an addition or wing to the tavern house, and upon the same lot, which cost and is worth $500, and which adds to the annual value of the house, &c., about $120. The trust debts were paid and the trust accomplished without touching these premises; and about the first of January, 1848, Brown rented them to a stranger for $500 a year, for that and the following year. All necessary parties having been brought before the Court, a decree was rendered requiring $120 of the rent of each of the years 1848 and 1849 to be paid to the complainant, and directing a commissioner, on the 1st day of January, 1850, to rent out the wing or addition for one year, and the right of making future orders and decrees, affecting the subject, was reserved. At a subsequent day of the same term, this decree was so modified as to offer to Brown the purchase of the wing or additional building at the sum of $500, secured by bonds, payable in one and two years, from the first of January, 1850—the acceptancy of which offer was to discharge all claims for rent after the said first day of January.

An insolvent debtor conveyed his property to trustees for the benefit of *certain* creditors, a third person acquired the equity of redemption in the property, a part of the real property remained after payment of debts upon which additional buildings had been made by consent of the holder of the equity. A creditor not provided for, had a judgment and a

The bill, as should have been before stated, prays for general relief, and therefore authorizes such relief, as upon the facts stated in it, is appropriate and equitable. It does not charge fraud in any arrangement between Brown and Divine. But it presents the case of the complainant's embarrassed and insolvent debtor, expending his own means which should have gone to the payment of his debt upon the lot of Brown by his consent and request to the permanent and material enhancement of its value, the debtor himself in the meantime enjoying the property for a year or two, while it was protected by the trust deed, after which Brown assumed the proprietorship and possession. It seems to us that the case comes, substantially, within the

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principle of the case of *Athey* vs *Knotts, &c.*, (6 *B. Monroe*, 24.) And that a debtor cannot be permitted thus to withdraw from his creditors the means which he should have applied to the satisfaction of their demands. If the expenditure had been solely for the benefit of Brown, without any advantage to Divine, the latter would have had a good cause of action for so much money expended, or work done at Brown's request. When the expenditure was made, the legal title was in the trustees and the property was under their control; and although it was probably then understood, or at least expected, that this property would be ultimately freed from the trust and devolve upon Brown, there was, probably, some uncertainty, both as to the time and the extent to which this would happen. And as it does not appear in what manner Brown acquired his interest, nor by what title he held it, we cannot assume that he had such title as would have authorized him to take or control the possession, until he actually did so about the first of January, 1848; and cannot, therefore, assume that Divine derived any remuneration from Brown by reason of his occupation of the premises prior to that time. Nor has either of these parties, both of whom failed to answer, alleged that Brown has to any extent made compensation for the benefit which his property has received from the expenditures made upon it at his request. That benefit may be assumed to have been equal to $500 when Brown took possession or control on the first of January, 1848. And to that extent Divine had in equity and good conscience a claim upon him which constitutes a chose in action, liable under our statutes to be subjected to his debts. Whether any arrangement which Brown and Divine might have made for compensating the latter by a continued occupation of the premises, would have been valid against creditors, is a question not necessary to be decided, as no such arrangement is suggested in the pleadings. We suppose, however, that if there had been, in substance, a lease, such an interest would have been subject to creditors. The fact appearing in the

return of *nulla bona*, and filed his bill to have payment out of the rent and interest of the debtor in the property—Held that he was entitled to relief to the extent of the value of the improvements, and the interest on that value.

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DIVINE & BROWN vs STEELE.

proof, but not referred to in the pleadings, that by arrangement between Brown and the lessees for the two years 1848 and 1849, Divine was to receive the benefit of the lease to the extent of $300 for each year, furnishes, in its most favorable aspect for the defendants, the evidence of an acknowledged indebtedness by Brown to Divine, which may be assumed to have been for the building now in question. A more unfavorable inference might be that Brown was acting throughout for the benefit of Divine and to the injury of his creditors. But there being no allegation of payment on the one side, or of fraud on the other, the fact referred to can only be considered as corroborating the assumption before made, that Divine was entitled to compensation to the extent that his improvement had enhanced the value of Brown's lot. And as this claim, which was properly subject to be appropriated by attachment to the payment of his debts, gave him an equitable lien upon the building which he had erected, and if it was inseparable, also upon the ground which it covered, it was not inappropriate to decree that the complainant should be satisfied to the extent of this claim of his debtor out of the rent due and accruing, or from sale of the building to which the claim attached.

So far, therefore, there are sufficient grounds for the principle on which the decree is based. But according to the views which we have taken, the complainant was entitled to have from Brown, or from the rent or sale of the building in question, the sum of $500, its value when Brown got the possession, (1st January, 1848,) with legal interest from that time. And as it appears that the wing or addition to which this claim attaches, cannot be removed or separated from the main building, without serious injury to the wing or addition, and would probably be sacrificed at an inadeqnate price if sold separately, the claim should be satisfied out of the rent, as specifically prayed for, unless Brown should assume to pay it on such reasonable terms as were proposed in the modified decree. But by that decree he was required to pay $500 in addition to the $240 ap-

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propriated from the rents of 1848 and 1849, which is considerably more than $500, with its interest from the 1st January, 1848, for which the property was bound.

Wherefore, the decree is reversed, and the cause remanded for a decree in conformity with this opinion.

Kinkead and Breckinridge for plaintiffs; *Porter and U. Turner* for defendant.

Carter's Executors *vs* Carter.

TROVER.

ERROR TO THE WOODFORD CIRCUIT.

Case 90.

Executors. Instructions.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

June 27.

Case stated.

THIS action of trover was brought by the executors of Goodloe Carter against (his son) Joseph C. Carter to recover damages for the alleged conversion of a note for $700, executed by the defendant to George W. Carter, (his brother,) and by him assigned to the testator in his lifetime. Among other defences attempted to be made out by evidence under the plea of not guilty, the defendant relied upon the fact that the testator's widow, Mary C. Carter, named as one of the executors in the will, but who never qualified, had, after the testator's death and before the qualification of the other executors or any of them, and before the probate of the will, and under the belief that she was acting in accordance with the intention of the testator in taking the assignment of the note, delivered it to the defendant as his to be cancelled. There was evidence conducing to establish these facts, and the Court instructed the jury, in substance, that if they believed these facts from the evidence, they must find for the defendant, which they accordingly did. And the judgment rendered thereon for the defendant is now brought up for revision.

It is error in the Court to instruct the jury upon the evidence to find

Before entering upon the question presented by the instruction above noticed, we remark, in answer to an argument urged in suppost of the judgment, that were

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CARTER'S EX'S. vs CARTER.

for one party, though there is evidence conducing to prove a state of fact which might authorize such finding, unless the instruction be based upon the belief of the particular fact which would render such finding proper.

it conceded that the plaintiff's evidence, as stated in the record, does not prove a demand and refusal of the note, or a direct or actual conversion of it by the defendant, the facts assumed in the instructions, and which, upon the whole evidence, were sufficiently established, do prove and indeed constitute a conversion for which the defendant is liable in this action, unless Mrs. Carter, who delivered the note to him to be cancelled, had a right, as one of the executors named in the will, under the circumstances stated in the instruction, to make a valid surrender or delivery of the note for that purpose.

It will be observed that the instruction is not based upon the belief of the jury that the testator took the assignment of the note for the benefit of the defendant, but upon their belief that Mrs. Carter acted under that impression. The jury being directed to find for the defendant upon the facts stated in the instruction, without reference to the intention with which the testator took the note, the evidence bearing upon this point need not be noticed farther than to say, that if it conduces to prove, and would have authorized the jury to find the intention of the testator to have been as supposed, it certainly is not conclusive, and cannot sustain the verdict if the instruction be erroneous. The propriety of the instruction then presents the only serious question in the case.

It appears from the testimony of George Carter and Mrs. Carter, herself, and indeed was admitted before they testified, that Mrs. Carter had determined not to administer on the estate of her husband or qualify as executrix, before she delivered up the note to the defendant; and, as it may be inferred, that this determination was known to him, it would seem to be probable that the delivery of the note was not intended or understood to be an act of administration, or done under the authority derived from the will as an executor therein named, but merely an act of supposed justice and propriety in delivering to the defendant an article which blonged to him, but was in the possession of Mrs.

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Carter, or found among the papers or effects of her deceased husband. If such was the true character and intent of the transaction as understood by both parties, it would seem, that in point of justice and fairness, the validity of the surrender, or at least its operation as a transfer of property, or as an extinguishment of debt, would depend essentially upon the correctness of the supposition under which it was made, that is upon the right of the defendant to have the note. And it may be doubted whether, as it was not intended as an executorial act nor done in the character of executor, the delivery should, under any view of the powers of a nominated executor before qualification, be regarded conclusively divesting the executors of their interest and legal title in the note, without regard to the question of the defendant's right to have it, and although it may have been delivered and received under an entire mistake as to that right. If this doubt be well founded, it would be questionable whether the instruction is not erroneous in not presenting to the jury the enquiry whether the note was in fact taken up by the testator for the benefit of the defendant and as a gift to him, or at least the enquiry whether it was or was not surrendered by Mrs. Carter under the authority of the will and as executrix.

Can an executor who is nominated by the will, but who has not qualified, *but intending to do so* at the time, perform an act as such which will bind the executor who does qualify?— *quere.*

But waiving this doubt, the question on the instruction is whether this act of Mrs. Carter is, without regard to its intrinsic justice or propriety, valid as against the executors who have qualified, although she has not qualified, and has never intended to do so. Upon this question we have been referred to the 18th and 22d sections of our statute of 1797, concerning wills, &c., (*Statute Law*, 658 *and* 660,) and to the cases of *Monroe* vs *James*, in the Supreme Court of Virginia, (4 *Mun.* 194,) and *Mitchell* vs *Rice*, in this Court, (6 *J. J. Marshall*, 625.) We do not think it necessary to repeat or add to the reasoning of these cases, so far as they point out the essential difference produced by the statute in the rights and duties of executors, as compared with what they were in England under the com-

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bined operation of the common and the canon or civil law. The requisition that the executor shall execute bond with security for the faithful discharge of his duties, evinces clearly a regard for creditors and legatees, which is inconsistent with the admission of full executorial powers as existing solely by authority of the will and depending upon its being admitted to probate, without regard to the executor's failure to qualify by taking the oath and executing the bond required. Construing together the 18th section of the statute which requires the bond to be executed, and the 22d which reserves to executors, before probate, the same power over the testator's estate which they had by the pre-existing law, we are of opinion that, as a general proposition, the efficacy of this power to validate the acts done before probate, must depend upon not only the subsequent probate of the will by some one authorized to prove it, but also upon the subsequent qualification of the executor who performed the act. Whether if the act were lawful in its character, and done in good faith, and by a nominated executor, who at the time intended to qualify, but was prevented from doing so by some inevitable cause, death, &c., it would be deemed valid against the other executors, we need not decide, and we reserve that question as being too important to the community for any opinion to be intimated, or even formed upon it, unless actually presented. Nor is it necessary to decide whether the failure of one of the nominated executors to qualify when the others do, is a conclusive renunciation. The Court of Virginia seems to have been of opinion that it was so. We believe the impression and probably the practice in this State has been different.

If an executor who has not qualified, does an act which appertains to the duty of the executor who has qualified, it is not binding from

But however this may be, and if it be conceded that the future qualification of Mrs. Carter would make the delivery of the note to the defendant legal and valid against all the executors, we are of opinion that it would have this effect only, because she would then have executed a bond which would secure the estate against the loss, in case the delivery was in fact im-

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proper and therefore a waste of the assets. And we are satisfied that unless she does qualify, the mere fact that she was named as executrix in the will does not legalize the delivery of the note, nor afford a protection to the defendant in this action, but he must rest upon his right to have the note, or upon his not being bound to pay it, or upon some other ground, without any aid from the character of Mrs. Carter as executrix.

the mere fact of his being nominated by the will, without subsequent qualification.

The instruction given is obviously inconsistent with these views. Wherefore, the judgment is reversed, and the cause remanded for a new trial.

U. Turner for plaintiffs; *M. Brown and Smith* for defendants.

Waring's Ex'r., *vs* Waring.

CHANCERY

ERROR TO THE WOODFORD CIRCUIT.

Case 91.

Trusts. Decrees.

JUDGE SIMPSON delivered the opinion of the Court.

June 27.

J. U. WARING, in his lifetime, executed a writing in the following terms:

"If my wife Mariam and myself should ever part, or be separated or divorced, I will account to her and her heirs for all such advances as may be made to her by her father, Thomas Helm, and in the meantime they are to be kept to her separate use and control. All such advances are to be specifically and specially receipted for. Given under my hand and seal this 31st day of January, 1820."

The case stated.

On the back of said writing, there is a receipt signed by J. U. Waring, for cash notes received from Thomas Helm for the use of Mariam Waring, amounting to the sum of eighteen hundred and twenty dollars, which he was to hold according to the terms of the agreement.

Waring and his wife separated, and she obtained a divorce in the year 1843. He afterwards died, never

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WARING'S EX'R. vs WARING.

having paid to her the amount of the cash notes that he had received from her father, Thomas Helm, for her use, under the foregoing contract. In the year 1848, she brought this suit in chancery against his executors, to compel them to pay it to her.

Her right to a decree is resisted upon the ground—

First, That the writing does not create a valid trust, it being merely a contract between husband and wife.

Second, That by its terms the rights of the husband are not excluded—a gift to a woman after marriage "for her own use and benefit," vesting the title to the gift in the husband.

Third, That the agreement is one made in contemplation of the future separation of the husband and wife, and providing for her maintenance consequent thereon, and is, therefore, against the policy of the law and utterly void.

The contract purports to be, and evidently was, between Helm and Waring. Its object was to constitute the latter a trustee for his wife, to hold as her separate estate, the property which Helm, her father, might deem proper to place in his hands. The writing evidencing the contract, is inartificially drawn, but that such was its design is sufficiently manifest from its terms and stipulations; and that it was a contract made with Helm is proved by the fact that he retained the writing in his possession after its execution by Waring.

A father may convey property to his son-in-law in trust to be paid his daughter under such circumstances as he may choose. That it is to be paid to her in case of separation or divorce, does not render it invalid.

Helm had a right to create a trust estate out of his own property, with such limitations and restrictions as he thought proper to impose. The writing executed by Waring is merely evidence of the terms of the trust, and that he had accepted, and bound himself to execute it. If it had been created by a writing executed by Helm and Waring jointly, the first transferring the property in trust to the latter, for the separate use of his wife, and subject to her control, the trust, however, to cease and determine, and the property to be surrendered to the wife, in the event of a separation or a divorce, and the latter accepting the trust upon the

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terms prescribed by the donor; could any valid objection have been made to the transaction, or could such a trust be inoperative, because it was against the policy of the law, or upon any other ground? A trust of that description bears very little, if any, resemblance to a contract binding the husband to pay a certain sum for the support and sustenance of his wife in the event of a separation. In such a case the support is to come from the estate of the husband, and the right of the wife is contingent, depending upon a separation between her and her husband. In the case of the trust, the provision made for the wife, does not come from the estate of the husband, but from the estate of her father in the hands of the husband as trustee, and the right of the wife to it is not contingent, but it is her separate estate from the time of its reception by her husband, and it is only his power over it as trustee, that is contingent and which terminates upon the occurrence of a separation or divorce. The trust in this case, although not created in the formal manner described, is substantially of the same character, and vests the wife with the same rights, and imposes the same duties and obligations upon the husband as trustee.

The estate was not given merely for the use and benefit of the wife, by which a right to it would have vested in the husband, but it was given for her separate use, thereby creating a separate estate in the wife, and excluding the husband from all right to it.

In such case, when the husband dies, the power to execute the trust ceases, and the right of the widow, the *cestui que trust* is complete.

When, therefore, the powers of the trustee ceased by the limitation contained in the trust itself, he had no longer any right to retain the trust estate in his hands; and having died without having transferred it to the beneficiary, or made any disposition of it for her use and benefit, the Court below very properly decreed its payment by the executors out of the estate in their hands, and in the decree there is no error to their prejudice.

Where executor and devisee are both sued, a decree should be to be levied of

But as the defendant in error had sued Robert Waring as devisee as well as executor, and had alleged in her bill that the testator's whole estate had

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SAVARY vs TAYLOR.

been devised to him, the decree should have been against the devisee as well as the executors, and directed the amount decreed to be made first out of the assets in the hands of the executors, and in case of a deficiency of such assets, then of the estate devised; and the failure to do so is to the prejudice of the defendant in error.

assets, if sufficient; if not, of estate devised.

Wherefore the decree is affirmed on the original errors, and reversed on the cross errors, and cause remanded for a decree in conformity with this opinion.

Lindsey for plaintiffs; *Porter* for defendant.

CHANCERY.

Case 92.

Savary *vs* Taylor.

APPEAL FROM THE FAYETTE CIRCUIT.

Attachment in Chancery. Abatement.

June 27.

JUDGE GRAHAM delivered the opinion of the Court.

A complainant obtaining an attachment in chancery in one county, and levying it upon property not sufficient to pay the debt, is no objection to his prosecuting another suit by attachment in another county and attaching other property.

IT appears from the bill and from the record exhibited in the defendant's plea, that before the commencement of this suit in the Fayette Circuit, the complainant had instituted his suit in chancery against the defendant in the Clarke Circuit, setting up the same demand and alleging the same fraudulent disposition of his property and fraudulent intention of the defendant to dispose of his property, as is charged in this bill; and in that bill the complainant prayed for and obtained an order to attach so much of the defendant's property as would be sufficient to pay the debt demanded. It also appears from the record filed with the defendant's plea in abatement, that some property had been attached in Clarke, but not sufficient to pay the complainant the sum claimed by him. In this suit the complainant charges in his bill, that the defendant had no property in Clarke free from incumbrance by mortgage or attachment, and that he would lose his debt unless permitted to attach

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the slave and wagon and horses then in Fayette. Although the bill in Clarke and this in Fayette, each, set up the same grounds of equity, and the same reasons requiring the interposition of the Chancellor, yet as the same property was not involved in both suits, (that attached in Fayette being different from that attached in Clarke,) it seems to this Court that the plea, in abatement, ought not to have been sustained. The property in Clarke was insufficient to pay the amount claimed to be due. To refuse the complainant the right to subject other property in another county and circuit might be productive of great injustice to him. A plea in abatement may be filed in chancery where two suits are pending for the same object, as decided in *Curd* vs *Lewis*, (1 *Dana*, 353,) but such plea is not usually resorted to, and should not be sustained by the Chancellor where other more appropriate redress can be given to the parties. In this case, if the attachment was levied on more property than was necessary to pay the residue of the complainant's demand, then the attachment might and should, on motion, have been discharged as to so much thereof as was unnecessarily restrained, or the Court might have put the complainant upon any other terms, consistent with doing justice to each party, (3 *B. Monroe*, 78,) but ought not to have dismissed his bill.

Where two suits in chancery are brought to obtain the same object, the one may be plead in abatement of the other: (8 *Dana* 333) though such a proceeding sho'd not be indulged to the prejudice of the party sueing, where other more appropriate relief can be granted.

The decree dismissing complainant's bill is, therefore, reversed, and the cause remanded to the Circuit Court, with directions to set aside the order dismissing the bill, and for other equitable proceedings not inconsistent with this opinion.

Hanson and Rogers for appellant; *Eginton and Caperton* for appellee.

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EJECTMENT.

Case 93.

Ramsey's Devisees *vs* Trent.

ERROR TO THE GENERAL COURT.

Champertous. Contracts.

July 3. CHIEF JUSTICE MARSHALL delivered the opinion of the Court, which was suspended by petition for re-hearing until the 27th July, when the petition was overruled.

Case stated. IN bar of this action of ejectment, which was brought upon the joint and several demise of nine lessors, the defendants, under the 3d section of the champerty act of 1824, (*Statute law*, 286,) pleaded that on the 9th day of August, 1845, (which was some days before the commencement of the action,) the defendants severally held possession of the land sued for adverse to the right and title of the plaintiff's lessors, and that on that day, certain of the lessors named, (and four in number,) entered into a contract with Harlan & Craddock, attorneys at law, for the institution of the present suit, and for the recovery of the land in controversy by them as their attorneys, and in consideration of their obtaining judgment and possession of the land for them, agreed that said Harlan & Craddock should have part and profit of the same, to-wit: one-fourth of the proceeds of the sale of said land when sold by them, out of which fourth the costs and expenses of the suit were to be deducted; and the plea proceeds to set out the contract as being in these words: "The subscribers, as devisees of John Ramsey, deceased, as the owners of ten thousand acres of land, lying in the counties of Washington and Anderson, in the State of Kentucky, and several parcels thereof being in the possession of one James Trent and others, we have employed Harlan & Craddock to remove the intruders and obtain full possession of our entire tract of land. Now if the said Harlan & Craddock shall succeed in recovering judgment and of obtaining of said parcels of land

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for us, then we oblige ourselves to pay them one-fourth of the value of each parcel of land so recovered, and in the same proportion for whatever may be recovered, payable when we make sale of the same—all expenses and costs are to be deducted from said one, fourth of the value of said parcels, and the remainder or balance to be paid to said Harlan & Craddock."

Judgment of the General Court.

A demurrer to this plea was overruled, and thereupon the plaintiff for replication to the plea, averred that the persons therein named (and who were parties to the agreement) were not the only heirs and devisees of John Ramsey and claimants of the land sued for and only lessors of the plaintiff, but that five others named in the replication are also heirs and devisees of said John Ramsey and claimants of said land and joint and several lessors of plaintiff; that the said defendants were not in the adverse possession of the land in contest under conflicting title to that of the lessors of the plaintiff, but that said defendants, or those under whom they claim, before the commencement of this action, viz, on the day of , at the State aforesaid, severally took from one Isaac B. Cox, a lease for the lands in contest for the use and benefit of said plaintiff, and became and were the tenants of said lessors of plaintiff on said land, recognising and acknowledging the title of said plaintiff, and that said defendants so continued to hold under and recognize said plaintiff's title, until within less than twenty years previous to the commencement of this action, wherefore, &c. A demurrer to this replication was sustained, and judgment having been rendered thereon in bar of the action, the case comes to this Court upon these pleadings alone.

The first part of the replication was intended, as we suppose, to raise the question whether the agreement of a part of the lessors even if champertous could bar the entire action brought upon the joint and several demise of five other lessors with them. The same question, however, arises on the demurrer to the plea, and this part of the replication does not introduce any material fact in addition to those appearing in the declara-

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tion and plea. We remark upon this part of the case, that in the contract set out in the plea, the four persons therein named as the employers of Harlan & Craddock are represented as owners of the land. And although the replication states that the five other persons are also heirs and devisees of John Ramsey and claimants of the land, it does not state them to be part owners, and upon these pleadings the implication is that the suit was instituted by and for the benefit of the four lessors who were parties to the contract, though in the name of other lessors with them. If, therefore, the contract be champertous, we are inclined to the opinion that, although made by four only of the lessors, it is a bar to the whole action. What would be its effect, if it appeared that all of the lessors were really interested in the claim and in the action, we need not decide. The statement that they were devisees and claimants of the land and joint and several lessors of the plaintiff, is not deemed sufficient to counteract the recital in the contract under which the suit was instituted and carried on.

The last part of the replication is intended as a special traverse or qualified denial of the adverse possession alleged in the plea and which was essential to make the contract therein set out champertous within the act of 1824. It does not deny the averment of the plea that the defendants held the possession adverse to the right and title of the lessors at the date of the contract, but denies that they were in possession under conflicting title to that of the lessors. The first section of the statute makes void a sale or conveyance of land of which any other than the vendor or vendee shall at the time have possession adverse to the right or title so sold or purchased. The second section denounces a contract or undertaking to recover or carry on a suit for recovery of any such pretended title to land of which adverse possession is held under conflicting title as aforesaid, for or in consideration to have part or profit thereof. It then goes on to deny the right of action upon such contract to either party, and

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declares that such title or claim shall vest in the commonwealth, and enure to the benefit of the person in possession without office found. The third section authorises the person, so in possession, his heirs or assigns to plead such contract in bar of any action or suit brought upon the title to which it relates. Going back to the possession which is to vitiate the contract, it seems to us that the same possession which under the first section would make the sale or conveyance void, would under the second make the contract for recovering the land also void, with all the consequences mentioned in the second and third sections. The second section, it is true, speaks of adverse possession under conflicting title, whereas, if there were nothing more, it might be inferred that the adverse possession must be under a title derived from the commonwealth, or at least under paper title. But the section says "under conflicting title *as aforesaid*," evidently referring to the first section and to the adverse possession therein described, which is a possession adverse to the right or title so sold, and requires no other title in the person in possession than such as is sufficient to make his possession adverse. Possession under claim of ownership is itself a grade of title, and will suffice to constitute the conflicting title referred to in the third section, which being necessarily adverse to the right and title sold or conveyed by another, it also suffices under the first section to make void the sale and conveyance. This adverse possession under claim of ownership, which is sufficient under both sections, is not in our opinion directly denied by the averment of the replication that the possession was not under conflicting title to that of the lessors. But this qualified denial is itself but an introduction to the subsequent averments which are intended to show that the possession was not held under conflicting title, or at any rate was not such as to render the contract champertous under the statute.

The principle relied on to take the case out of the statute is no doubt correct, and is sustained by the case

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RAMSEY'S DEV'S vs TRENT.

of *Castleman* vs *Combs*, (7 *Monroe*, 276,) and other cases in which it is in effect declared that the statute does not apply where the occupant holds in such a manner that he is bound to surrender to the vendor without questioning his title. This principle it is admitted applies as well to a contract for the recovery of the land as to a sale or conveyance of it. But the principle is that if the occupant is under such obligation to surrender the possession, his possession is not adverse within the statute; and in order to make the principle applicable to the case, it must appear that the obligation to surrender existed at the date of the conveyance or contract.

We are of opinion that the replication does not sufficiently show this essential fact. It avers indeed that the land was at some uncertain period leased to the defendants for the benefit of the lessors; that they became and were the tenants of the lessors holding under and recognizing their titles, and so continued until within less than twenty years before the commencement of the action. But it does not aver that they were tenants of the lessors at the date of the contract set up in the plea, or that they then recognized or held under their title, or that they were then under any obligation to surrender the possession to them. And although it may have been intended that these facts should be inferred from the facts stated, yet as such inference is far from being necessary or conclusive, and is in truth little more than conjecture, it cannot be supposed that the Court will assume the facts necessary to make out the replication when they are neither stated nor necessarily implied. The pleading should state facts sufficient to constitute an answer to the preceding plea. But the sufficiency of this replication rests upon an uncertain inference, which not being stated as a fact, can give no strength to it.

Wilhite vs *Roberts*: (4 *Dana* 172) cited and approved.

There being then no error in adjudging the replication to be insufficient, the judgment for the defendants is right unless their plea, which is reached by the demurrer to the replication, is itself insufficient to defeat

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the action. As the plea sets out the contract alleged to be champertous the averments relating to the nature and effect of that contract go for nothing. The contract speaks for itself and must be judged by its own terms. And there being no averment of any other agreement for instituting or carrying on the suit but that which is contained in the written contract, the sole question on the plea is whether upon its face that contract is champertous. This question is we think virtually decided by the construction given to the written contract and to the statute in the case of *Wilkite* vs *Roberts*, (4 *Dana*, 172.) The contract in that case is contained in the following words: "Now if the said Rudd & Roberts shall succeed in recovering possession of said lot of ground on the demise aforesaid, then I oblige myself to pay them to the amount of one half of the value of the above mentioned ground." The Court was of opinion that this was not an agreement to give "*part or profit out of the thing in contest*," and therefore not champertous. And it was further said, in that case, that the litigant might regulate his attorney's fee by the value or half of the value of the property in contest, as well as by the value of any other property.

A contract to pay counsel a fee equal to one-fourth of the value of the land which may be recovered less by the costs of the suit, and to wait until the land is sold, is not champertous within the provisions of the act of 1824.

The only material difference between the contract then before the Court and that now under consideration consists in the fact that in the present case the attorneys are to wait for their fee until the employers sell the land. All else relates merely to the quantum of the fee. And although the amount of the expenses and costs is to be deducted from the one fourth of the value of the land and the attorneys are to receive the residue only of the one fourth thus diminished, this residue constitutes their whole fee. The expenses, &c. are not to come out of their fee, nor to be paid by them, nor to be postponed until the land is sold. But the employers have to pay the expenses and costs as in other cases, and after reimbursing themselves out of one fourth of the value of the land when sold, the balance of the fourth is to be paid as a fee.

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The attorneys, it is true, are to wait until the land is sold by the employers before they are entitled to payment. But this is worse for them than if they could demand a fee equal to one fourth of the value of the land, less the expenses, &c., immediately upon recovering it. And although the contract implies that the employers may look to the sale of the land for the means of paying the fee, it does not give to the attorneys any specific right to the proceeds. And the reference to one fourth of the value of the land, is only for the purpose of measuring or ascertaining the fee.

The terms of the contract show that the fee was to be regulated by the value of the recovery compared in a certain manner with the costs and expenses. It does not show that the attorneys were to have part or profit out of the thing in contest, or that the contract was made in its actual form in order to secure to them such part or profit in evasion of the statute. The contract, therefore, is not, in our opinion, champertous within the statute, and the plea should have been adjudged bad on the demurrer.

Wherefore, the judgment is reversed and the cause remanded with directions to render judgment against the sufficiency of the plea and for further proceedings.

J. & W. L. Harlan for plaintiffs; *Lindsey and Robinson & Johnson* for defendant.

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CHANCERY.

Case 94.

Hunt *vs* Johnson, &c.

ERROR TO THE FAYETTE CIRCUIT.

Wills. Devises.

June 28. JUDGE GRAHAM delivered the opinion of the Court.

The case stated.

RICHARD JOHNSON, of Virginia, died in the year 1814, leaving at his death his widow and three children, Ormasinda, Mary Y. and Marshall D., infants. Shortly after his death another daughter was born, and named Sarah. Ormasinda married John M. Hunt, and

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died leaving one child only, Martha J. Hunt, the complainant in this suit. Mary Y. is yet alive, and is now the wife of said John M. Hunt. Marshall D. died an infant without issue and intestate, and before the birth of the posthumous child. Sarah, the posthumous daughter, married Plunkett and died leaving two children.

In March 1814, said Richard Johnson made his will, which, after his death, was admitted to record in the county of his residence in Virginia. By the second clause of his will, he gives and bequeaths the whole of his estate both real and personal to his wife until his children arrive at lawful age or marry; "at which time (the will reads) I lend to my daughter Ormasinda two negroes, by name Bob and Nelly, and their increase during her life and to her heirs forever, and in case of her decease without issue to go to her surviving brother and sister and their heirs. Thirdly, I also lend to my daughter Mary Yates Johnson, when she arrives at lawful age or marries, two negroes, by name Lewis and Betty, to her and her heirs forever, but for want of such heir or heirs, the above negroes, Lewis and Betty and their increase, to be divided equally between her brother and sister and their heirs. Fourthly, I give to my son, Marshall Durrett Johnson, to him and his heirs forever, two negroes, by name Aylett and Charlotte and their issue, but in case my son should die without lawful heir, it is my will that the above negroes Aylett and Charlotte and their issue should be divided between my surviving daughters or their heirs: *provided* any of those negroes, above named, which are *lent* to my daughters and *given* to my son should die before they get them into possession, the value thereof is to be made up out of my estate equal to those that may be living: *provided* my wife should now be pregnant with a son or daughter, it is my will that he or she should share equally with the rest of my children in the same manner as specified above. Fifthly, the balance of my estate, both real and personal, I bequeath to my wife during her natural life, and at her death such estate and their increase to be equally divided among my three

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children, Ormasinda, Mary Y. and Marshall D. Johnson, or the survivors or their heirs. It is understood that the part which my daughters may have at the decease of my wife is lent, as before expressed, unless they should die leaving heirs. In that case it is given to their heirs forever."

The widow of the testator has also died, and this suit is brought to obtain a proper distribution or division of the estate. The only matter of controversy is the extent of the interest of the heirs of Sarah, the posthumous daughter, in the property according to the will of her father.

In the construction of wills the intention of the testator must be carried out unless it be against law; and if there be repugnant clauses, the latter must prevail. Words, or even clauses, may be transposed when such transposition is necessary to make sense of the provisions of the will. Every clause shall be so construed as to give effect thereto, if practicable, without contradiction.

On the part of the complainant it is insisted that she is not entitled to any portion of the property given to Marshall D. Johnson, nor to any part of the residue of the estate mentioned in the fifth clause of the will, whilst, on the part of her heirs, it is claimed that the will gives to her, since the death of said Marshall D. Johnson, one equal third part of the estate.

Many rules laid down in the authorities for the construction of wills have been quoted in the argument of this cause. They may, however, so far at least as this case is concerned be summed up in a few general rules: "Find out the intention of the testator, and that intention must take place, unless contrary to the rules of law." "If there be two clauses in a will so totally repugnant to each other that they cannot stand together, the latter shall be received and the former rejected." "Words and even clauses in a will may be transposed, when such transposition is necessary to make sense of the other provisions of the will, or to carry out its intent." "Every clause shall be so construed, if it be practicable, as to make the whole stand together without being contradictory." With these rules before us, we must endeavor to ascertain the intent of the testator. In the proviso to the fourth clause, the testator says it is his will that the posthumous child "should *share equally* with the rest of my children in the *same manner as specified above*." It is urged that by this expression he meant that he or she should only receive two negroes

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of equal value with those given to the other children, subject to the same limitation in case of death without issue, &c. We do not think that such was the intention. If he intended that this posthumous child should share equally with his other children in the estate devised to them in that clause, then that portion of his estate given to them would have to be divided into four instead of three equal parts. We think such was not his design, nor is it so argued by the counsel. How shall we arrive at the conclusion that he intended to give this child two negroes? There is nothing in the clause so indicating unless it be the words "share in the same manner." These words we suppose were used by him to indicate, not that she should take only two negroes, but to show the manner in which she should hold her portion of the estate. He clearly intended equality. If the words "in my estate" had followed immediately after the word children, there would be no doubt that the will should be so construed as to give her one equal part in the whole, unless that construction is necessarily restricted by the fifth clause. We think the will should be construed as if those words had been so inserted, and that the testator by that clause designed that all his children living, and to be born, should share equally his whole estate, and that if the posthumous child should be a daughter, then her portion is lent to her in the same manner as her sisters take, but if that child should be a son, then a portion is given to him in the same manner as to the other son. The testator seems to manifest a peculiar anxiety for equality. If the two negroes given to each of his children should happen to die before the child marries or arrives to the age of twenty-one years, that child is not to lose any thing by reason of the death of the slave. On the contrary the value of the slave so lost to his child, is to be made up from other portions of his estate to equalize him or her with each of the others. If the clause or proviso in favor of the posthumous child had not been inserted until after the close of all his devises and bequests, there would be

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no room for controversy, that in that case she would have taken, under the will, an equal fourth part of his estate, all the children being alive at the time of distribution, or if dead, leaving children to take the place of the deceased child. It seems to us that no violence would be done to the will, but that on the contrary the intention of the testator would be effectuated by such transposition.

A case of the transposition of a clause to give effect to the clearly expressed intention to maintain equality in the division of his estate.

We are satisfied that taking the whole will together, the obvious intent of the testator would be frustrated, unless we construe the proviso in the fourth clause to mean that the posthumous child should take equally with the others in the entire estate; and although he expressly in the fifth clause names his three living children, as the legatees and devisees of the residuum, after the termination of his wife's life estate, he did so with the belief that in the proviso alluded to, he had sufficiently expressed his intention and wishes in favor of the after born child, and that his will would be understood as if he added that proviso to the fifth as he did to the fourth clause. This view of the will settles also the question as to that portion given to Marshall D., who died, as already stated, an unmarried infant without children, and consequently that the estate of Richard Johnson, deceased, should be divided into three equal parts, giving the heir of Sarah Plunkett, deceased, one of those parts.

The decree of the Circuit Court is in accordance with this opinion and is therefore affirmed.

Shy & Beck for plaintiff; *Robinson & Johnson* for defendants.

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Violett *vs* Powell's Administrator.

CASE.

ERROR TO THE HENRY CIRCUIT.

Case 95.

Principal and Agent. Parol Contracts.

JUDGE GRAHAM delivered the opinion of the Court.

July 2.

The case stated.

POWELL, Baker and Whitaker were jointly concerned and interested in the purchase of hogs in the year 1847. About the first of June, 1847, E. B. Stratton was employed by Powell, one of the firm, to purchase hogs for the firm, but was requested by Powell that he (the witness) should deal in his own name, and should not disclose the name of his principals, on account of the effect a knowledge that they were in the market might have on prices in the county. Under this employment and arrangement, Stratton on the 7th June, purchased hogs of the plaintiff and delivered to him a writing showing the terms of the contract which reads thus: "I have this day bought of Jos. W. Violett all the hogs he may fatten for market. I am bound to take as many as 100 head. He is bound to furnish as many as 75 head, to weigh 200 pounds and upwards, well fatted, to be delivered between the 20th November and 10th December next at 3 cents per lb. gross, payable on the 1st of March next. Given under my hand this 7th day of June, 1847." Signed by Stratton. Sometime after this contract was thus made by Stratton in his own name, he disclosed to Violett, the fact that he had made the contract as the agent of Powell, Baker & Whittaker, and not for his own benefit. Powell and Whitaker both died before December, 1847.

In September 1848 Violett instituted this action of assumpsit against Bishop and Ransdell, administrators of the estate of Powell, deceased. The declaration contains several counts in usual form, stating a contract for the purchase of hogs by Stratton as agent for said firm. The contract is stated substantially as it is

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contained in the writing, but is laid as in parol, no reference being had to the writing executed by Stratton. The breach of this contract, as laid in the declaration, consists in the failure of the firm and each member thereof and of the defendants, to take from the plaintiff about ninety hogs which he had ready for delivery according to his contract.

The decision of the Circuit Court.

The Court believing that the proof did not sustain the declaration, so instructed the jury, who accordingly found a verdict for the defendants. The Court having overruled the plaintiff's motion for a new trial, he has brought the case to this Court for revision.

The reason why the Court gave the instruction to the jury does not appear in the record, but we suppose as the other facts charg ed were clearly established by the proof, the Judge believed that the execution and delivery of the written agreement, by Stratton in his own name, precluded a recovery against his principal. The counsel for defendants rely on that ground of defence in this Court.

The contract of the agent within the scope of his authority is binding upon the principal, or if it be subsequently recognized, although made in the name of the agent, who appeared at the time to act for himself, and although the principal was not in fact trusted at the making of the contract: (*Chit. on Con., last ed., p.* 224, *note* 3: *Paley on Agency*, 248–9.) But if the seller knows who is the principal, but gives credit to the agent instead of the principal, the rule is different. The principal cannot deprive the other

"There can be no doubt in a parol contract that the principal is personally liable upon any contract of his agent, if made within the scope of his authority given or subsequently recognized, although the agent made the bargain in his own name, and appeared at the time to act for himself, so that *in fact* the principal could not have been trusted, or his credit or his responsibility regarded or required at the time of the bargain." (*Chitty on Contracts, last edition*, 224, *note* 3; *Paley on Agency*, 248–9. On the other hand, if the seller knows who the principal is, but gives credit to the agent instead of the principal, the rule is different. Thus it has been decided, that where a party dealing with an agent, takes his promissory note with a knowledge of his agency, and of the liability of the principal for the debt on which the note is given, he thereby discharges the principal. Such a contract cannot be afterwards rescinded and a new one made so as to bind the principal without his knowledge and assent. (*Chitty on Contracts*, 224, *note* 2.) The rights of a principal to sue

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for and recover in his own name upon contracts made with the agent by others, and the liabilities of the principal incurred by acts of his agent, rest on different principles. Where a buyer has been led to contract under an impression that his contract is made with one person, the intervention of a third person who was unknown to him at the time of the contract, cannot be permitted to deprive him of any set-off or other equitable or legal defence which he may have against the person with whom he made the contract. It would be wrong and fraudulent for the principal to keep himself concealed, permit his agent to make contracts in his own name, and then by disclosing himself reap all the advantages and profits of the contract, to the disadvantage of the other who had traded with the agent as the only person interested in the transaction. (*Paley* 326–7–8.)

party to the contract of any equity—a set-off against the agent where he lies back and is name and credit, is not considered or known in the contract: (*Paley on Agency*, 326, 7–8.)

If an agent take a bond to himself instead of his principal, the parol contract is so far merged in the written that the principal cannot maintain an action on the contract in his own name, but it must be in the name of his agent in the written agreement. The principal is unknown, and the person with whom the agent has contracted in his own name, has a right to regard him only as the contracting party. The action must be in the name of him in whom the *legal* title in such written contract is vested, although the exclusive interest or benefit to be derived from the contract or subject matter of litigation be in another. (1 *Chitty*, 3.) But the rule as to defendants is different. A contract made by an agent is the contract of the principal. If the agency is disclosed at the time of the contract, although it be by deed in writing, if the agent contracts as such, the principal may be sued in an action at law. (1 *Chity*, 37–8.) If the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or agent may be sued at the election of the seller. (1 *Chitty*, 41—*note* 1.)

Though there be a *written contract* between the agent, and another, if the name of the principal be not disclosed, but the principal afterwards recognize the contract as made for him, assumpsit lies against the principal, and the writing may be used to show the terms of the contract.

Suppose a man purchase (as in this case) the property of another on credit, the day of payment being fixed

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in a written contract beyond the day when the property is to be delivered. The nominal purchaser becomes insolvent, but the seller is afterwards informed that the contract was in fact made by his vendee as agent for another. Shall the seller in such case be compelled to part with his property—shall the principal be permitted to reap all the profits—convert the property to his own use—refuse to pay for it, and require the seller to look for redress to an insolvent? In equity and good conscience the principal ought to be compelled to perform the agent's contract, whether that contract be by parol or in a writing having the effect of a bond. In this case there are facts proved which place the moral duty of the principals beyond doubt. They requested the agent not to disclose his agency. They afterwards recognized and approved the contract. Powell, the active principal died. His administrators recognized the contract as binding on them, and they, after his death, as well Powell, before his death, in conversations on this subject, spoke of and recognized the written contract made and executed by Stratton, as having been made for his principals for their benefit and as obligatory on them. To permit them to escape responsibility, would be manifestly unjust. Assumpsit is an equitable action. The defendants are in justice liable to the plaintiff for the injury he has sustained by their refusal to carry out the contract. It seems to this Court that the plaintiff was authorized to bring and maintain this action, and that the writing by Stratton can be used only to show the terms of the contract, the acts which each contracting party was to perform, and ought not to defeat the plaintiff in his action against the principal. If these views are correct, it follows that the Circuit Court erred in the instructions given to the jury, and should have granted a new trial to the plaintiff.

The judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to set

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aside the verdict and judgment, and grant the plaintiff a new trial without payment of costs.

H. Marshall for plaintiff; *Lindsey* for defendant,

Mahan, &c. *vs.* Tydings, &c.

DEBT.

Case 96.

ERROR TO THE JEFFERSON CIRCUIT.

Debt. Injunction Bonds. Executors. Pleadings.

July 10.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THIS action of debt was brought by Tydings and others upon an injunction bond executed under the penalty of $200 by Lucy Ann Mahan, executrix, and Daniel Keasy her surety, to enjoin a judgmnent, in the bill mentioned, with the condition showing that the injunction was prayed for and obtained as executrix, and that the bond was to be void if the said Lucy Ann Mahan, *as executrix* aforesaid, and Daniel Keasy, or either of them, shall well and truly pay to Tydings, &c., or either of them, the amount of the judgment enjoined, and all damages and costs that may occur by reason of the injunction if found wrongful. The declaration, after setting out the bond and condition, avers that on the 22d day of December, 1848, by the decree of the Louisville Chancery Court, the injunction was found wrongful, and was dissolved with $10 60 damages, it being ten per cent. on the amount enjoined, and by said decree the said bill was dismissed, and the complainant decreed to pay the now plaintiffs their costs ($16 40) out of assets in her hands, as executrix aforesaid. And the breach alleged is, that the defendants, nor either of them, though well knowing the premises, and often so requested to do, have not paid the said judgment, nor the damages and costs aforesaid, or any part thereof, nor the said $200, &c. &c.

A demurrer to the declaration was overruled, and demurrers to four pleas, filed by the defendants, were sustained; and the defendants saying nothing further

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MAHAN &c. *vs* TYDINGS &c.

in bar of the action, an enquiry of damages was had, and a judgment rendered against the defendants for the debt, in the declaration mentioned, to be discharged by the payment of $127 60, the damages assessed by the jury.

An injunction bond executed by an executor to injoin a judgment against him as such, is *prima facie* upon good consideration, and a plea averring only that it was without consideration is bad.

The pleas all aver, in terms more or less specific, that the injunction was obtained by said Lucy Ann, as executrix of R. P. Mahan, to enjoin a judgment against her in that character, founded upon a note of said Robbert P., and not upon any promise, undertaking, liability, or indebtedness, of said Lucy Ann; and that the bond sued on was executed for obtaining said injunction, and for no other consideration; and the first plea concludes that the same was executed without any good or valuable consideration. But upon the face of the declaration and bond, the suspension and delay of execution to be produced by the injunction were *prima facie*, at least a sufficient consideration for the execution of the bond. And there being nothing in this plea to show that it was not so, it was properly adjudged bad. This plea does not contain facts sufficient to defeat the action, if in any case an executor may be required to execute a bond as preliminary to obtaining an injunction against him in his fiducial capacity. We are not prepared to say that a bond may not be required as the condition of obtaining such an injunction, or that even if it should be more comprehensive than it need have been, it is therefore illegal and void, or without consideration.

The second plea, in addition to the facts already stated, avers, in substance, that the defendants executed the bond under the mistaken belief that said Lucy Ann, as executrix, could not obtain an injunction without executing such bond. This plea does not say that the bond was not required by the Chancellor as the condition of the injunction being granted. It therefore rests upon the single position implied in it, that an executor cannot be legally required to execute a bond on obtaining such an injunction as this, and that the bond executed under such requisition is void.

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Executors may be required to execute injunction bonds: the statutes of 1796 and 1798 make no exceptions of executors obtaining injunctions.

This, as already said, we cannot admit. The statutes of 1796 and 1798 (*Statute Law*, 809–10,) make no exception or exemption, but require that when an injunction is ordered the complainant or complainants shall give bond, &c. And although there may not be as much reason as in other cases for requiring bond from an executor or administrator who has already executed bond under public authority for the due administration of the assets, it does not follow that they are to be excepted from the statute by construction, nor that they ought to be exempted by the Legislature, unless some further provision be made for the security of the creditor. Executors do not always give security for the performance of their duties, this being sometimes dispensed with by their testators. And if it is to be assumed that the security given upon the qualification of the executor or administrator is, in every instance, sufficient when he is received, it cannot be assumed that this continues invariably to be the case, or that as soon as the security becomes doubtful or insufficient, a new one is required and given, or that the executor or administrator seeking an injunction will disclose in his bill the fact either that he gave no security, or that the security given has become doubtful or insufficient.

Then conceding, as we are inclined to do, that if an executor conceives that the interest of the estate which he represents can only be maintained by suspending the proceedings of a particular creditor until the matter of right can be heard in equity, he should be allowed to obtain an injunction for this purpose upon the responsibility of the estate for whose benefit he is acting, and without incurring other responsibility on his part than for the due administration of the assets; still it would seem to be unreasonable that the creditor who is diligently prosecuting his remedy upon the assets, should be subject to the legal obstruction presented by an injunction, without special or direct security, that when the obstruction being found wrongful is removed, he will not find himself in a worse condition than if he

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had not been impeded; and it would seem to be just and reasonable that the law which authorizes the obstruction for the benefit of the decedent's estate should furnish an indemnity to the creditor by requiring from the representative of the estate a bond which shall secure the due application of the assets, whereby if his debt might and should have been paid if it had not been enjoined, it may, when the injunction is dissolved, still be paid together with the ordinary remuneration for the delay and expense which has been incurred, so far as there were assets at the date of the injunction, or afterwards, which in the due course of administration should be applied to this purpose. Such a bond, it is true, would be but ancillary to the original executorial bond. But it would have specific relation to the debt enjoined, and would furnish a specific remedy and a specific security for the due application of the assets, so far as that debt is concerned. Which, while as already shown, it seems to be in all cases proper, is or may in many cases be necessary for the security of the creditor who is obstructed and delayed. And the law makes no discrimination between the cases, and furnishes no means for making it, on the ground of the previous security being or not being sufficient. Nor do we perceive any greater reason for not requiring this additional and specific security from an executor who has already given bond for a due administration, than there would be for not requiring new security from an individual who has already secured the debt.

Injunction bonds by executors should secure to the creditor all the rights and legal consequences resulting from an unsuccessful prosecution of the injunction, that existed at its obtention, or followed its dissolution, to the extent of assets at its obtention—and to

With these views of the subject, we are not prepared to follow the cases referred to in Virginia and Indiana, to the extent of determining that an executor or administrator is entitled to an injunction without entering into any new bond for the purpose. But we admit the force of those cases in demonstrating the impropriety of requiring the fiduciary to incur a direct personal responsibility for the debt of the estate which he represents as the condition of his obtaining an injunction for the protection of the estate from what he conceives to be an inequitable and unjust demand. And as the stat-

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utes make no discrimination in the requisition that the complainant obtaining an injunction shall give bond, &c., the difference between the cases of an executor enjoining a judgment against him in that character which affects the assets only, and an individual enjoining a judgment for his personal debt, would seem to indicate, not that the bond should be altogether dispensed with in the former case, which would violate the letter of the statute, but that the bond should be adapted to the nature of the case and bind the executor and his surety, in case the injunction should be found wrongful and be dissolved, &c., to pay the judgment, &c., out of assets in the due course of administration, to the extent that the same might be properly applied thereto. Such a bond would secure the creditor against loss from a mal-administration of the assets to his prejudice during the pendency of the injunction, and in fact against any loss which might properly be attributed to the improper suspension of his legal remedy. Such a bond binding the executor and his surety personally, so far as the debt enjoined is concerned, for the due administration of the assets from the date of the bond, and securing the creditor from loss by subsequent mal-administration to his prejudice, is all the security that he can justly demand from the law which authorizes the suspension of his remedy, and is all that in our opinion, the statute, construed with reference to the peculiarities of the case, intended to require or authorize.

that extent sho'd the surety be bound also.

This construction of the statute does not sustain the second plea, which was properly adjudged to be insufficient, because it assumes that no bond should have been or could be required of the executor upon granting the injunction. But it is evident that to an action on a bond limiting the obligation of the obligors in the manner above described, and in which, according to our construction the statute should be understood as limiting it in the case of executors and administrators, a plea of *plene administravit*, or a plea showing that the executor had no assets unadministered at the date

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of the bond, nor at any time afterwards, would be a sufficient answer, since it would show that there had been no breach of the condition, but that there never had been any assets to which this bond could apply; or that if there ever had been any, they had been duly and legally administered by appropriating them to other purposes rightfully preferred to the plaintiff's demand. Then the third and fourth pleas, besides averring all the facts contained in the first and second, and others not necessary to be noticed, go on to aver in the most positive and explicit terms, that the said Lucy Ann hath fully administered all the goods and chattels, money, effects, rights, and credits of the said R. P. Mahan which ever came to her hands, and that she had not, at the date of the bond, nor at the commencement of the suit in which the judgment enjoined was obtained, nor at any time afterwards, any goods, chattels, rights, credits, money, or effects, which were of the said Robert P. at the time of his death.

If the obligors are absolutely bound by the writing sued on, to pay the judgment, &c., in case the injunction should be found wrongful and be dissolved, these pleas do not meet nor avoid this obligation, and are no answer to the action. But if the obligation extends only to the due administration of the assets, and makes the obligors personally liable to the plaintiffs only to the extent of a mal-administration to their prejudice, then not only are these two pleas good, as showing that there has been no breach, and consequently that there is no personal liability for the judgment, &c., on the part of the obligors, but the declaration is insufficient, because while it is grounded on the supposed personal liability of the obligors, and alleges for breach the nonpayment by them of the judgment, damages and costs, and of the penalty of the bond, it shows no fact which made them personally liable to pay any of these sums. If the defendants are personally liable only in case of the executor's failure, by reason of mal-administration, to pay the judgment, &c., out of the assets, the decla-

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ration should aver, in some form, the fact upon which their liability depends.

A declaration on an injunction bond given by an executor, to stay a judgment against him as such, should aver, in addition to the non-payment of the judgment, that there were assets at its obtention and a waste thereof by the executor, or some other averment besides non-payment alone.

The question of the sufficiency of the pleas and of the declaration, is thus resolved into a question of construction of the bond itself, or rather of the condition which shows the real duty and obligation of the parties. There is no doubt that the obligation to pay the penalty is personal upon the obligors, but it is subject to the condition underwritten, which shows that its whole object and purpose was to obtain the injunction therein referred to, that said injunction was obtained by the executrix as such, and that the bond was to be void if she, as executrix, should pay, &c. The condition does not recite the amount and character of the judgment as it should have done. But it may be fairly assumed, from the recitals just noticed, that the judgment was against the said Lucy Ann, as executrix only, which is rendered more certain by the decree, upon the dissolution, that she should pay the damages out of assets, which is stated in the declaration. And the pleas explicitly aver that the judgment was against her as executrix—and one of them goes on to state that it was to be levied of assets, &c. But we think all this is to be assumed on the face of the declaration, and indeed of the condition itself. And as the condition, though in form, expressing only the condition on which the bond is to be void, is, in fact, intended and understood to designate the duty to be secured by the bond, and the failure of which is to constitute a breach of the condition, and thus to give a cause of action, the question is whether this condition, expressing that the bond is to be void if the said Lucy Ann, as executrix, should, in case the injunction be wrongful, pay a judgment against her as executrix and enjoined by her as executrix, may not and should not be understood as referring wholly to her character and duty as executrix; and whether the provision that if, as executrix, she should pay, &c., the bond shall be void, does not import according to the usual office of the conditions annexed to bonds, that the duty intended to be designated and

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secured by the bond, was that of paying, as executrix, which must be in the due course of administration, and would of course bind her to pay only out of the assets, which according to the laws of administration were, or ought to have been, then in her hands, or which might aftewards come.

If such be the constructive effect of the bond, it would, as already shown, meet all the requisitions of justice and of the statute, securing to the creditor all that he can rightfully ask, and imposing no unjust or oppressive liability on the executrix and her surety. These considerations operate strongly in favor of such a construction, and whatever might be the case, if this were a private instrument executed between party and party, each having an equal right to prescribe its terms and control its language, we are of opinion that, regarding it as an instrument drawn up for a particular purpose by a public officer under the command of the law, and executed by the parties, as must be presumed, in full confidence in the skill and fidelity of the officer, it should, if possible, be so construed as to accomplish its proposed objects under the law, of furnishing to the creditor the contemplated security, without imposing upon the other party any greater obligation than the law intends to impose, and which being greater than either the law or the occasion requires, would be at once unjust and oppressive. We are further of opinion that the condition of this bond, may and in view of the subject matter, and of its manifest object and consideration, and of the circumstances under which it was executed, and of the law requiring it, should be construed as imposing no other duty than that of paying, as executrix, out of assets, if there be any applicable to the debt enjoined, and that if there are no assets thus applicable, the non-payment is no breach of the duty intended to be secured, and no breach of the condition of the bond.

In corroboration of these views and of the conclusion just stated, we refer to the case of *Slaughter, &c.* vs *M'Clain, &c.*, (1 *A. K. Marsh.* 485,) in which the

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Chief Justice, delivering the opinion of the Court, uesd the following language: "According to the statutory provisions of this State, a judgment, in most cases, against an executor or administrator, must be rendered to be levied of the estate of the testator or intestate, and there can be no doubt, where an injunction is obtained to stay proceedings upon such a judgment, that the executor or administrator should, in general, only be required to execute a bond to discharge the judgment, in case the injunction should be dissolved, out of the estate of the testator or intestate; and in an action upon a bond of that description, we apprehend *plene administravet* might well be pleaded." And in a subsequent part of the opinion, in supporting the conclusion that in that case the obligors had bound themselves personally to pay the judgment, (which was said to be proper in some cases,) the Court says: "For the condition of the bond is not that Slaughter shall pay, as administrator, or that the payment shall be made out of the estate of the deceased, but they are both bound jointly and severally to pay the money without any limitation or restriction as to the fund or the manner in which the payment is to be made." The clear implication is that if the condition had been (as in this case) that Slaughter shall pay as administrator, the construction of the bond would have been different. And as the obligation of the surety is clearly not greater than that of the principal, both are entitled to the same construction and are subject to the same restricted and contingent liability.

Where the declaration is defective, a demurrer to pleas sho'd be overruled because of the defect in the declaration.

It follows that the declaration should have been adjudged insufficient upon the demurrer to it, and that if it were drawn as it should be, the third and fourth pleas would each be a sufficient answer. And as the demurrers to each of the pleas reaches the declaration, the defendants were entitled to judgment on the demurrers, on the ground that the declaration is insufficient.

Wherefore, the judgment is reversed and the cause remanded with directions to overrule the demurrers to the pleas on the ground that the declaration is bad,

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and unless the plaintiff should amend his declaration, to render judgment in bar of the action.

Russeau & Elliott for plaintiffs; *Morris* for defendants.

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CHANCERY.

Case 97.

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ERROR TO THE BOURBON CIRCUIT.

Wills. Personal Estate. Its exoneration from Debts.

July 11.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in the case.

THIS bill was filed by a portion of the heirs of N. C. Marsh against his devisees and his administrator with the will annexed, to obtain administration of the personal estate of the testator; and the bill having been dismissed, the sole question presented for our consideration is whether the decedent has by his will exonerated his personal estate from the payment of debts and legacies, and thrown the whole burthen upon the real estate.

The decision of the English Courts of Chancery is that the testator may, between devisees or heirs at law on one side, and legatees or distributees on the other, change the order of liability and make the debts and legacies fall exclusively upon the real estate, to the entire exoneration of the personalty.

This question has occurred very frequently in the English Chancery, and the result of the cases seems to be that, although the personal estate is the primary and natural fund for payment of debts and legacies, the testator may, as between the devisees or heir on the one side, and the legatees or distributees on the other, change the order of liability and make the debts and legacies fall exclusively upon the real estate, to the entire exoneration of the personalty. To produce this effect, however, it must not only appear that he has charged the real estate, but also that he has discharged or exonerated the personalty from its natural and appropriate burthen. And whether he has done so in the particular case, is the precise point of enquiry.

In modern cases it is held that if the intention to exonerate the personalty appear so plainly

It seems formerly to have been held that the personal estate was not exonerated, unless the testator expressly declared such to be his intention. In more modern cases, however, it is held that though there be not express words of exoneration, yet if the intention to

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exonerate appear so plainly upon the whole will, or by any part of it, as to convince the mind of the Judge, that intention should be carried into effect. A variety of circumstances or expressions have, in different cases, been taken as sufficiently demonstrative of intention, one way or the other. But in *Booth* vs *Blundel*, (1 *Merivale's Ch. Rep.* 192,) Lord Eldon shows that the same words or clauses in different wills have, by different Judges, been taken as authorizing opposite inferences when compared with the entire will, and that it is only from the whole will that the effect of particular clauses can be determined, and the intention satisfactorily deduced. In *Ancaster* vs *Mayer*, Lord Thurlow, after analysing the will and stating inferences from its different clauses, said: "The true ground upon which I proceed, is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or by any other declaration which would tend, in law, to the purpose of preserving the personal estate for any given purpose whatever." It might be inferred from the rule, as thus laid down, that the personal estate would not be exonerated, unless it appeared, by the will, that it was intended to be preserved for some given purpose. But it was said by the Master of the Rolls, in *Hancox* vs *Abbey*, (11 *Vesey*, 186,) that "the intention (to exonerate) may be found, not merely in the mode in which the personal estate is given, but also in the mode in which the real estate is given; for the real estate may be so appropriated to the payment of the debts as to show a clear intention that it shall not be a burthen upon any other fund; though an intention to exonerate the personal estate is not in any other way expressed." He goes on further to say: "It is true, that a devise to sell for payment of all debts shall not exonerate the personal estate. That shows nothing more than an intention that all debts shall be paid, and the real estate, if that be necessary, shall be applied. But the direction to apply a particular portion of the real estate to the payment of one particular debt, affords a very different inference." And it

upon the face of the whole will, as to convince the mind of the Judge, that intention should be carried into effect: (2 *Williams on Executors*, 1047-54; *Ram on Assets, chap.* 3, *sec.* 5, *chap.* 6, *sec.* 2, 8 *vol. Law Lib.*)

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was in view of such a case, that the remark first quoted from him, was doubtless made.

With this view of the general doctrines on the subject, which, with a reference to numerous cases, will be found in 2 *William's on Executors, p.* 1047 *to* 1054, and in *Ram on Assets, chap.* 3, *sec.* 5, *and chap.* 6, *sec.* 2, 8 *vol. of Law Library*, we pass to a statement of the will itself, on which the question in this case arises.

Clauses of the will cited.

The will first notices that a farm which had been purchased by himself and his brothers T. and B. for their sister R. had been conveyed to him, and he desires that it be held by his brothers in trust for her and her heirs. He then gives to his said sister R. the sum of $2000, payable in three years, to be held by his said brothers in trust for her, and at her death to go to her children and descendants, if any. To his nephew A. C. he gives $500, to be paid in five years. To B. R. $1000, to be paid in one year; and at the end of the will he gives to his namesake, N. K., $500, to be paid in six years; and to his brother T., in trust for J. C., his Pioneer jenny, &c. After the three first legacies, the will emancipates a female slave, with certain directions as to her treatment, &c. &c., and then proceeds as follows:

"I devise to my brother Benedict B. Marsh, as my trustee, the farm on which I live and the slaves I own, to him and his successors forever, subject to the following condition: he is to see that my slaves are well treated and attended to and properly worked and managed as long as they live, and all the children of said slaves, born after my death, shall be raised and attended to by my said trustee, until they are twenty-one years old, and as they respectively attain to that age, they shall be free. He shall pay all of my debts and legacies as they fall due, and the balance of the yearly proceeds of the farm and slaves shall belong to the said Benedict, to be used as his own, but he is not to have the liberty to sell the land or the slaves. My object is that the land and the slaves shall be kept together un-

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til the slaves to be born shall be raised and liberated. I do not expect my said trustee to live to see the end of it, but I wish him to appoint a suitable trustee to hold and manage the farm for the purposes aforesaid, the children or heirs of said Benedict to have the proceeds after paying the trustee a reasonable compensation; and as soon as the slaves are all liberated, the fee simple title in the said land to vest in the said Benedict's heirs at law to be held by them forever."

This is the entire substance of the will, and a transcript of so much of it as relates to the real estate. The will makes no bequest of any part of the personal estate except the gift of the Pioneer jenny. It makes no disposition of the residue, names no executor, and with the single exception of the Pioneer jenny, is wholly silent as to the personalty. Then it must be left to its natural condition and to the disposition which the law makes of it, for payment of debts and legacies, unless the clauses relating to the real estate, by making that the exclusive fund for such payment, necessarily exonerate the personal estate, either wholly or so far as the real estate will go, and thus leaves the personalty or the residue of it subject to distribution. But it would seem strange that if the testator intended thus to exonerate the personal estate, he did not make some disposition of it, or, in the words Lord Thurlaw, declare or evince some purpose of the exoneration.

The fact that no disposition is made of the personalty, is a strong circumstance against the inference that it was the intention of the testator to exonerate it, though it *may* not be conclusive.

There is force too in the argument that as so much care was taken to place the property of his sister R. in trust for her and her children, it is strange that the testator should not have secured, in a similar manner, her portion of the personalty, if he had intended or expected it to be free from its liability to debts, &c., and subject to distribution. From these considerations and from the fact that no provision is made for personal expenses, which devolve naturally upon the personal estate, the inference is suggested that the testator intended and expected the personalty to remain under its proper legal liability for debts and expenses, or that he did not think of it, or that he may have supposed that

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in making his brother Benedict his trustee, he was making him executor with power over the personalty. But conceding that although the personal estate, with the exception of one item, remains wholly undisposed of and unnoticed, the inferences above stated are not decisive; and that although there is wanting the declaration of a purpose for exonerating the personalty which Lord Thurlow deemed necessary, it may yet be exonerated, still it must be admitted that under the circumstances stated, the personal estate cannot be discharged in the absence of any express declaration to that effect, unless by such manifest appropriation or exclusive charge of the debts and legacies upon the real estate, as leaves no room for rational doubt that the testator intended the real estate to bear the entire burthen. Does the disposition made of the real estate furnish demonstration of such an intention?

The withdrawal to a great extent of the real estate from the payment of debts and legacies, by the will, and its appropriation to other purposes, is also a circumstance against the conclusion that the intention was to charge the real, and exonerate the personal estate.

In looking to the will for an answer to this question, we find that the real estate and slaves, so far from being directly appropriated to the payment of debts or legacies, are, to a great extent, withdrawn from liability for them by the prohibition of any sale of either. And, instead of the land being devised in trust for the payment of debts and legacies, the primary object of the trust is evidently to carry out the testator's plan for the treatment and management of his slaves, and for the emancipation of their offspring. The land is appropriated primarily to this purpose without the power of alienation for a period which might extend to sixty or seventy years after the testator's death. It is only the annual profits, after supporting the slaves, old and young, that are free from this trust. And even this surplus, if any, is not expressly appropriated to the payment of debts or legacies. There seems, therefore, to be no plausible ground for saying that the personal estate is clear or necessarily exempt by the disposition made of the real estate, unless it is to be understood that the devise to the trustee or to his heirs is on condition of his or their paying the debts and legacies.

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But the trustee himself is to have no benefit from the devise, unless it be the balance of the proceeds of the farm and slaves; and certainly there is nothing on the face of the will to show that these proceeds will pay the debts and legacies as they become due, or that they would even keep down the interest, or enable the trustee to borrow the money for their payment. On the face of the will the legacies amount to $4000, payable on an average in about three years; and by the answer of the trustee, who is also the administrator, and whose statements are admitted for the purpose of this question, it appears that the debts exceed $11,000, while the personal estate is only between $6,000 and $7,000; that the annual rent of the land would be about $600, and the hire of the available slaves would probably amount, at present, to little more than enough to support such as are incapable of labor, or at any rate not to enough, with the annual rent of the farm, to pay six per cent. on the amount of debts and legacies. The land itself is worth about $23,000. But it is not to be sold.

The amount of indebtedness of the testator, and other facts appearing in the case, also considered in arriving at the intention of the testator, on the question of the exoneration of the personalty.

The debts were due at the death of the testator, or at the end of six months from the grant of administration, within which no suit could be brought against the administrator. Then, as it is at least doubtful whether the proceeds of the land and slaves, kept together as directed, would at any time pay the interest on the debts and legacies, or enable the trustee to raise the money to pay them, the will cannot be considered as providing the means of payment independently of the personalty. It should not, therefore, be construed as requiring the trustee to pay them without resort to the personalty as the condition of any interest in the land given either to him or his heirs, unless such requisition be unequivocally manifested. If there be such a condition without the means of compliance, the trustee might, it is true, avoid the burthen imposed upon him. But what then would become of the trust, and of the debts and legacies? These last would still have to be paid, and the trust for the benefit of the slaves should

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in some way, be substantially carried out. And when this should be accomplished the devise to the heirs of Bendict would take effect. In the meantime the debts and legacies would be paid out of the personalty, and with the means which might be drawn from the land and slaves with as little violation of the testator's intention, with respect to them, as might be; and the question would come at last, whether the real estate, after the slaves became free, should reimburse the amount contributed by the personalty, which, with its interest, might exceed the value of the real estate.

The unreasonableness and futility of the supposed provision for paying the debts and legacies, as they should fall due, without resort to the personalty, affords a strong argument against the existence of any such intention; and we are of opinion that such intention is not demonstrated by the language of the will. It is true the devise of the farm and the slaves to the trustee, Bendict, and his successors, is made subject to the following condition. But the condition immediately following relates wholly to the management and treatment of the slaves, and to the liberation of those born after the testator's death. The succeeding sentence, "he shall pay all my debts and legacies as they fall due, and the balance of the yearly proceeds, &c., shall belong to said Benedict," &c., although it certainly expresses a duty of the trustee and an object of the trust, is not necessarily embraced under the word condition, unless that word be understood, as it probably should be, as equivalent to the word trust, and as, therefore, merely referring to the trusts or purposes of the devise. And if the land and slaves had been devised expressly in trust, to manage and liberate the slaves, as directed in the first of these sentences, and upon the further trust, or for the further purpose of paying all the debts and legacies as they fall due out of the yearly proceeds, the balance to belong to the trustee, &c., and denying the power of sale. This would have amounted, at most, to a charge upon the yearly profits, and not to an exoneration of the personalty, (*Ancaster* vs *Mayer*, *supra*, *and*

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11 *Vesey, supra,*) even if the yearly profits were sufficient to raise money to meet the charge. And much less should it be taken as an exoneration of the personalty, when the yearly proceeds are inadequate to the payment intended.

But the will does not say he shall pay out of the annual proceeds, which in fact he could not do. As the payment could not in any manner be made out of the annual proceeds, there could have been no balance after such payment, and the inference arising from the disposition of the balance following immediately upon the direction to pay, is repelled. How then was it intended that the trustee should pay? Was it to be out of his own estate when the devise, under the restriction imposed, did not furnish the means even of paying the annual interest, and would probably never do so? Or was he to do it by means of the proceeds after the application and the exhaustion of the personalty? The first alternative would suppose the imposition of a burthen without recompense and without even the means of bearing it. The last only supposes that the testator might have considered that the personal estate would, as a matter of course and of law, be appropriated to the payment of debts, and that the legacies being postponed by the will might be paid as they fell due, or that he might have considered that in making his brother Benedict trustee, and directing him to pay the debts and legacies, he was in effect making him executor, or at least designating him as the person to administer his estate. For it is to be observed that he not only fails to appoint an executor, *eo nomine*, and not only makes his brother Benedict a trustee, but calls him his (the testator's) trustee. And in fact upon the face of the will itself, taking into consideration the omission to dispose of the personalty, or to appoint an executor, and the fact that the land itself is not subjected to the payment of debts, &c., but both land and slaves, except the annual proceeds actually withdrawn, and the proceeds subjected only by implication, we think the fair inference is, that the testator supposed he was giving

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his trustee power over his whole estate, and in effect making him his executor; and that the requisition that he should pay the debts, &c., was based upon this idea, and therefore implied a subjection of the personalty, as well as of the annual proceeds of the land and slaves to the required payment. And if this be not the proper inference from the whole will, we should adopt the inference that the testator supposed the law would apply the personalty to the payment of debts, &c., and intended to leave it subject to this appropriation, rather than to suppose that he intended to impose the entire burthen on the trustee, when he was not furnishing him the means of bearing it, nor any fair equivalent for it.

We have met with no case in which a will resembling this in its substantial features has been held to exonerate the personal estate, nor indeed have we met with any in which such exoneration has been effected, without some disposition being made of the personalty by the will. The case of *Bridgman* vs *Dove*, (1 *Atkyns*, 200,) is a strong authority in favor of the conclusion that the direction in this will that the devisee in trust shall pay the debts, &c., is not to be regarded as a condition throwing the whole burthen upon that devisee or upon the land. In the case of *Miles* vs *Leigh*, (3 *Atkyns*, 573.) The *whole personalty* was bequeathed to testator's wife, and his land devised to her for life, and the legacy to his daughter was to be paid to her in twelve months after his son R. should come to enjoy the premises, and if R. should die before the wife, H., another son, coming to the possession of the premises, should pay, &c. Here was not only a plain intent that the person who possessed the real estate should pay the legcy, which, in effect, made its payment a condition annexed to the estate, but the additional fact that the whole personalty was bequeathed away; and the conclusion adopted by the Chancellor, that the personal estate was exonerated, seems to be unavoidable.

There is not, in our opinion, any such clear demonstration, nor in fact any satisfactory demonstration in

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the will before us, that the testator intended to answer the payment of all the debts and legacies out of the real estate, or by the devisee out of his own property, as a condition of the devise of the real estate, or that he intended to exonerate the personalty, or has in any way done it.

Wherefore, the decree is affirmed.

Smiths and B. & A. Monroe for heirs; *G. Davis* for devisees.

Higginbotham *vs* Higginbotham & Clarke.

FORC. ENT. AND DET. *Case* 98.

ERROR TO THE GARRARD CIRCUIT.

Possession. Agent and Principal. Tenants at will.

JUDGE SIMPSON delivered the opinion of the Court.

July 3.

THIS warrant of forcible entry and detainer was sued out by the plaintiff in error against the defendants, who were found guilty of the forcible entry and detainer complained of, by the verdict of the jury in the country. They, thereupon, traversed the inquisition and carried the case into the Circuit Court, and upon a trial in that court, a verdict was rendered in their favor, the Court having instructed the jury to find for the defendants, as in the case of a non-suit.

The case stated.

The facts proved upon the trial were, that, by virtue of a writ of *habere facias possessionem* which issued upon a judgment in ejectment in favor of the plaintiff and against the defendant Higginbotham, the Sheriff went upon the premises in contest and executed the writ by delivering the possession to the plaintiff, who was not present on the occasion, but who was represented by his agent Perry Bates. The Sheriff having found the defendant, Sally Clarke, on the premises, turned her out of possession under the writ against her co-defendant. It appeared by the proof that she lived in the house with the defendant Higginbotham, and had been so living at and previous to the time of the com-

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HIGGINBOTHAM vs HIGGINBOTHAM & CLARKE.

mencement of the action of ejectment against him. It did not appear that they were married, nor did it appear that she had any title or claim to the premises, or any right to remain there, except at the will or sufferance of the defendant Higginbotham. Bates, who acted as the agent of the plaintiff, in receiving the possession of the house and the land in contest, was in the employment of the plaintiff under a contract by which he was entitled to certain stipulated wages for his services, and was to be furnished with a house to reside in, and had been directed by the plaintiff to occupy the house the possession of which the Sheriff was to deliver to him by virtue of said writ. Under that direction and as the agent of the plaintiff, Bates put into the house, when the possession of it was delivered to him by the Sheriff, a wagon load of his own property, and having fastened the door of the house, he left the premises for the purpose of going after his family and the balance of his property, to remove them to the same place. He returned on the same day and found that the defendants, during his absence, had entered, and put his property out of the house, and taken possession of the premises in contest. The plaintiff, thereupon, sued out this warrant of forcible entry and detainer against them in his own name.

Two questions arise upon the facts in this case:

1st. Did the plaintiff acquire such a possession, in fact, as enables him to maintain a warrant of forcible entry and detainer in his own name?

2d. Had the Sheriff a right to turn Sally Clarke out of possession by virtue of the writ of *habere facias* against Higginbotham?

If a Sheriff on executing a writ of *hab. fa.* delivers possession to the plaintiff's agent, it is in fact and in law, the possession of the principal, & he may maintain a warrant for a forcible entry

In regard to the first question, if the possession was actually delivered by the Sheriff to the agent of the plaintiff, it was both in law and in fact the plaintiff's and not the agents possession, and the warrant was properly sued out in the name and for the benefit of the plaintiff: (*Kercheval* vs *Ambler*, 4 *Dana*, 167.)

It is, however, contended that Bates was not merely the agent of the plaintiff, but was also his tenant, at

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least of the house, and that the possession of it was the possession of Bates and not of the plaintiff. If this were the legal deduction from the facts proved, still the instruction given by the Court upon the trial, would have been unauthorized and erroneous, inasmuch as Bates had, beyond controversy, received the possession of the remainder of the premises as agent for the plaintiff, and to that extent, at least, the plaintiff could maintain a warrant in his own name.

upon that possession: (*Kercheval* v *Ambler*, 4 *Dana*, 167.)

But if Bates, according to the understanding of the parties was to occupy the house merely as the servant of the plaintiff, the latter, in contemplation of law, still remained in the possession. Bates was not, properly speaking, a tenant, he had no interest in the tenement, the plaintiff might have removed him to another house at any time; his contract to furnish him a house to reside in, gave Bates no claim to the house in question, and he stood in the same attitude that any other person in the employment of the plaintiff, who merely as a servant occupied a house belonging to him whilst in his service would have done. The assumption that the owner, by permitting persons in his service to occupy his rooms or houses, as his servants, thereby loses the possession of them, is not only inadmissible but preposterous. Whilst in his employment such persons are considered in law as part of his family, and their possession is his possession. A tenement might be leased to a person in the employment of the owner so as to invest the lessee with an interest in it, and the exclusive possession in fact, but there was no evidence in this case of any leasing by the plaintiff to Bates, but the latter was merely to occupy it by the permission of the plaintiff in fulfilment of the contract of hiring between the parties.

As it regards the second question, if the defendant, Sally Clarke, merely resided with the defendant Higginbotham, by his permission, without any interest in, or title to the premises, she constituted a part of his family, and as such, the writ against him authorized the Sheriff to turn her out of the possession.

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WATTS &c. *vs* SANDERS &c.

The defendant in the action of ejectment and all who are members of his family, or mere tenants at will to him, may be turned out by the writ of *hab. fa.*

And if the circumstances would justify the conclusion that she entered under his title, and had a possession jointly with him, yet if she had no title to, or interest in the premises, but was there merely as his tenant at will, or at sufferance, she might have been turned out of the possession by virtue of the writ of *habere facias* against him, whether she entered upon the land before or after the commencement of the action of ejectment: (*Mattox* vs *Helm*, 5 *Littell*, 185.)

The Court below, therefore, erred in the instructions to the jury, directing them to find as in the case of a non-suit.

Wherefore, the judgment is reversed and cause remanded for a new trial, and further proceedings in conformity with this opinion.

Turner, Dunlap & Burton for plaintiff; *J. & W. L. Harlan* for defendants.

DEBT.

Case 99.

Watts, &c. *vs* Sanders, &c.

APPEAL FROM LIVINGSTON CIRCUIT.

Injunction Bonds. Parties at Law.

July 3.

JUDGE GRAHAM delivered the opinion of the Court.

The case stated.

IT appears, from the facts agreed in this case, that Watts had purchased of McCauly and Patterson a lot of ground in Smithland, and executed to them, in consideration thereof, three notes of $166 66⅔ each. One of these notes was assigned to Sanders, who brought suit thereon and obtained judgment. Actions at law were pending on the other notes. Watts filed his bill and obtained an injunction to stay Sanders from collecting his judgment at law, and to prevent the rendition of judgment on the other notes. Sanders, McCauly and Patterson were made defendants to the bill. The bill is not copied into this record, and the only ground of equity stated in the agreed facts is, that the wives of McCauly and Patterson had not united in the deed and relinquished their right to dower. Upon ob-

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taining the injunction, Watts, with the other defendants in this action as his sureties, executed a bond to Sanders, McCauly and Patterson, in the penalty of $1000, with condition that "if the said Watts shall prosecute said injunction with effect, or shall well and truly pay and satisfy unto the said Sanders the judgment aforesaid with interest and costs, and shall satisfy McCauly and Patterson their demand, &c., and also pay and satisfy said Sanders, McCauly and Patterson all costs, damages and charges which may be recovered by, awarded or adjudged to them, or either of them, in case said injunction be dismissed," &c., "then," &c.

During the pendency of the suit in chancery, Mrs. McCauly and Mrs. Patterson, in due form of law, relinquished their right to dower. The Court on hearing decreed that by the relinquishment of dower, Watts obtained all the relief sought for by his bill, and then dismissed his bill, discharged the injunction without damages, and awarded costs to the complainant.

The action now before this Court by appeal, was instituted in the name of all the obligees, as plaintiffs, against the defendants, on the injunction bond, to recover the amount of Sanders' judgment, the collection of which had thus been enjoined.

The first objection taken to the proceedings is, that as the action is brought only for the injury to Sanders, and the other plaintiffs have no interest in this suit, they are improperly united as co-plaintiffs with Sanders. They are joint and not joint and several obligees. The bond is made with them jointly and not severally. This action is in *debt* upon the bond and averring the non-payment of the penalty of the bond; sets out the condition, and specifies the failure of the defendants to keep the condition. The action was properly brought in the name of all the joint obligees, although, in fact, only for the benefit of one: (1 *Chitty*, 9–10.)

On an injunction bond executed to several jointly as obligors, debt may be maintain-

The main question, however, is whether the facts show such a breach of the condition of the bond as will justify the maintenance of an action upon it.

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WATTS &c. vs SANDERS &c.

ed in the name of all for an injury to either by failing to perform the condition: (1 *Chit.* 9–10.)

It is urged that as Watts had grounds of equity and was bound to give security to avail himself of that equity, and by his suit obtained the relief sought, he did "prosecute his *suit* with effect," and no recovery can be had on the injunction bond.

For the appellees it is argued that the stay procured by the injunction is an injury to the plaintiff; that no injunction can be made effectual without the execution of the bond, and that the dissolution or discharge of an injunction necessarily gives a right of action on the bond. The cases of *Harrison* vs *Park*, (1 *J. J. Mar.* 170,) and of *Hunt* vs *Scobie*, (6 *B. Monroe*, 472,) are strongly relied upon as conclusively sustaining the propriety of the judgment.

The first case differs from this in several particulars. There the injunction was dissolved with damages and costs against the complainant. Here no damages are assessed against the complainant, and costs are decreed in his favor.

In the second case, that of *Hunt* vs *Scobie*, the condition of the bond was this: "Now if the said Porter & Hunt, or either of them, shall well and truly pay the amount of the judgment aforesaid, together with all damages and costs that shall be awarded against them to the said Scobie, in case said injunction is dissolved, or bill dismissed, then," &c. In that case the duty of the obligors to pay, depended solely upon the dissolution of the injunction or dismissal of the bill, and in view of these stipulations, the Court said, "as the injunction was dissolved and the bill dismissed, the obligors were bound by the *express terms* of the bond and condition to pay the judgment enjoined, although the complainant in the bill may have been so far justified in resorting to a Court of Equity, as that no damages were decreed against him upon the dissolution of the injunction, and he recovered his costs in the chancery suit."

Where the condition of the injunction bond is

In this case the obligation of the defendants to pay the judgment enjoined, is not made to turn upon the dissolution or perpetuation of the injunction, but on

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the condition that Watts shall well and truly prosecute the injunction with effect. If he has done so, then surely he has complied with the conditions of his bond. Did he prosecute it with effect? To determine this question, we must look to the decree of the Court rendered on the hearing of the cause. After stating that during the pendency of the suit, Mrs. McCauly and Mrs. Patterson had duly relinquished their dower, (for the want of which relinquishment the injunction had been granted,) the Court says that said, "Watts has thereby obtained all the relief sought for by his bill." Having obtained this relinquishment and thus perfected his title to the lot, it would have been very unjust to have retained the injunction any longer. The plaintiffs, at law, were then entitled to the privilege of pursuing their legal remedies to collect the sums due to them. The injunction was accordingly discharged; but because it had been rightfully granted, and the causes for its obtention had been removed during the pendency of the suit, it was discharged without damages, and the defendants McCauly and Patterson were directed to pay the complainant his costs expended in the prosecution of his suit. He had in truth obtained all the relief he claimed to be due to him—the objects of his suit were accomplished. He had prosecuted the injunction with effect, and having done so, had performed the condition of his bond.

to "prosecute the injunction with effect," and ground relied on for the injunction is removed, after the filing of the bill and obtaining the injunction, and the chancellor decide that on that account the injunction is dissolved, it is "a prosecution of the injunction with effect," & there is no liability on the injunction bond.

If this view of the facts and law of the case be correct, as we are satisfied it is, it follows that the Court, to whom the facts and law were submitted, ought to have rendered judgment for the defendants, and not having so done, but having given judgment for the plaintiffs, the judgment is erroneous. It is, therefore, reversed, and the cause is remanded with directions to set aside the judgment, and grant a new trial to defendants.

Grigsby for appellants; *Dallam* for appellees.

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ASSUMPSIT.

Case 100.

Mardis *vs* Tyler.

ERROR TO THE JEFFERSON CIRCUIT.

Parties. Assignments. Assignee and Assignor.

July 4. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The case stated.

THIS action of assumpsit was brought by Mardis as the assignee against Tyler, the payee and assignor of two notes drawn by J. N. McMichael, one for $1615 17, due the 1st of June, 1841, the other for $2000, due on the 1st day of June, 1842, in each of which a lien was retained by Tyler on certain property for the purchase money thereof. The declaration, after describing the notes as above, states, that shortly after their date, McMichael, for securing their payment, executed to Tyler a mortgage, duly recorded, on the same property mentioned in the notes, and also on all other property owned by him which was subject to execution; that on the 20th of November, 1840, Tyler, for a valuable consideration, assigned the said notes to Vance & Mardis; that said Vance & Mardis, on the 23d of June, 1841, assigned them without recourse to the plaintiff Mardis, who was one of said firm of Vance & Mardis, and one of the immediate assignees; that on the 28th day of June, 1841, Mardis instituted in the Louisville Chancery Court a suit upon said mortgage, and such proceedings were had therein that, after *a decree nisi*, a decree for the sale of the property, mentioned in the notes and mortgage, was rendered at the January term, 1845, and the same was regularly sold on the 10th of March, 1845, which was reported to the Court; that $1505, the proceeds of the entire property was credited on the first due of said two notes, and that the plaintiff had expended in the prosecution of said suit $—— in lawyer's fees and costs, of all which the defendant had due notice. And the plaintiff further avers, that owing to the insolvency of said McMichael

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then, before and now, he has been unable to collect any further sum of the amount aforesaid; that on various occasions during the pendency of said chancery suit, the defendant, "in consideration of his liability as asasignor, whenever said chancery suit should be decided and the said McMichael's property should be sold and exhausted, agreed and promised the plaintiff that as soon as the mortgage was foreclosed and the property therein specified was sold, that whatever balance was uncollected and unpaid by the sale thereof to the plaintiff, he, Tyler, would immediately thereupon pay to the plaintiff the amount unpaid and uncollected by the sale of said property," and that there remained uncollected of his demand against McMichael, on said notes, the sum of $——, besides interest and costs, &c. By reason of which undertaking and promise, the defendant hath become liable to pay the amount due on said notes with interest, &c., and the lawyer's fees and costs, &c., except the amount made by the sale aforesaid, and being so liable promised to pay, &c. And the plaintiff avers that, relying and confiding in the defendant's promise to pay him the balance due after the termination of the chancery suit and the sale of the property aforesaid, he did not bring and prosecute any further suit—nevertheless, &c.

The foregoing is the substance of the second count in the declaration, which differs from the first only in averring that the assignment by Tyler to Vance & Mardis was for a valuable consideration, and in stating the promise to pay what might be unpaid by the sale of the mortgaged property, &c. A third count for money had and received was afterwards added. The defendant demurred to each of the counts, and also pleaded non-assumpsit, on which issue was joined, and that the cause of action had not accrued within five years, which was traversed and an issue thereon. The demurrers to the two first counts having been sustained, the plaintiff withdrew the third count, and a judgment was rendered in bar of the action.

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MARDIS vs TYLER.

A remote assignee has no right of action against a previous assignor, though he may sue in the name of his assignor, between whom and his assignor there may be a right of action.

With regard to the first count, we need only say that being founded on the implied liability of Tyler, as assignor of the notes, the right of action, if any be shown against him, abides in his immediate assignees, Vance & Mardis. And, although the right of action on the note passed by their assignment to Mardis, the liability of Tyler, as assignor, was not assignable so as to vest any legal right or title in their assignee, and at most their assignment to Mardis invested him with an equitable interest in the liability of Tyler to them, and with the right, under proper circumstances, of asserting that liability by an action in their name for his benefit, or a right to assert it in equity. The circumstance that Mardis was one of the original assignees, does not affect the principle. If, after the assignment to Vance & Mardis, Vance alone had assigned his interest in the notes to Mardis, this would not have invested the latter with the legal title to the notes, and much less with the entire legal title or interest in the liability of Tyler, which was not assignable, and did not and could not pass by the joint assignment of both, as one of the original assignees, Mardis had a joint right of action with Vance upon the notes and upon the assignment. As the assignee of Vance & Mardis he had the sole right of action in his own name upon the notes. But even if this assignment had not been expressly without recourse, he would have had no legal remedy against Vance & Mardis upon their assignment, because he was one of the assignors, and no legal remedy against Vance alone for substantially the same reason.

The assignment of one of two assignees to the other does not authorize a suit at law in his name.

Since Mardis as the assignee of Vance & Mardis, and thus the remote assignee of Tyler, had not the legal interest and right of action on the assignment of Tyler, or on his liability as assignor, and since, as one of the two original assignees, he had only a joint right of action on the assignment or liability of Tyler, it follows that he has no separate right of action against Tyler merely upon his assignment or on his liability as assignor, but must ground his action, if he has any, upon some other contract or liability. The first count,

First count of declaration adjudged defective.

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therefore, is fatally defective, because, whether Tyler remains liable upon his assignment or not, the right of action is not in Mardis alone. And as the same is true of the second count, unless the additional grounds of action therein stated are sufficient, the question whether such diligence had been used against the obligor in the note as on that ground to fix the liability of the assignor, becomes even on the second count an immaterial, or at most a secondary enquiry, the material question being whether the promise, as therein alleged, is sufficient to sustain the action.

Tyler sold property to Mc., took notes reserving a lien for the consideration——assigned the note to V & M. V assigned to M. T took a mortgage upon the property with all the other property of Mc. M foreclosed this mortgage & then brought assumpsit against T, not having prosecuted any suit against Mc., alleging that T, in consideration of his liability as assignor, promised to pay as soon as the mortgage property was disposed of. Held that there being, as appears, a moral obligation on the part of T, it was not necessary to aver more than an express promise to pay.

The circumstances of this case are certainly peculiar in the fact that Tyler the payee and assignor had not only reserved on the face of the notes a lien upon the property for which they were given, but had also taken a mortgage upon the same and all other property of the obligor which could be reached by execution, leaving him insolvent, except so far as this mortgaged property might suffice to discharge the debt. It is a serious question whether, under these circumstances, the assignor having, by his own act, made the remedy in chancery the only efficient one by withdrawing the whole of the obligor's property from the reach of the legal remedy against him, he should not be considered as so far changing the rule of due diligence requisite for fixing his liability, as to dispense with the pursuit of the legal remedy which he had rendered wholly useless, and to make the proceeding in chancery and its result the test of diligence and liability, instead of the ordinary proceeding at law. If this should be assumed to be the effect, either in law or equity, of the circumstances stated, then, as the failure to use the diligence ordinarily required by action at law, did not discharge the assignor from liability, there was certainly a sufficient consideration for his promise during the progress of the chancery suit, or even at its termination, to pay what might remain unpaid by the appropriation of the mortgaged property. If, without the promise, a Court of Equity would have regarded the responsibility of Tyler as undischarged by the failure

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to sue the obligor at law, and would have enforced that liability, the express promise founded upon it would create a legal liability, enforcible in a Court of Law, and by action of assumpsit.

But waiving this proposition and its consequences, we think it clear, that the circumstances referred to, were calculated to withdraw the attention of the assignees from the legal remedy as a means of fixing the liability of the assignor, and to make them look to the remedy in chancery, which they were bound to pursue, as in itself sufficient for the purpose. And as the assignor might, undoubtedly, waive the necessity of strict legal diligence, as the test of his liability before it was actually discharged, we think that if the circumstances stated should have no greater effect, they should at least have that of establishing such waiver by slighter indications of an intention to dispense with the strict rule of diligence than would be otherwise required. In this view of the subject, we are not prepared to say that a promise, at any time during the pendency of the chancery suit, to pay, at its termination, whatever of the plaintiff's demand should not be collected by the due course of that remedy, should not be taken as implying a consent from the beginning that the prosecution of that remedy, should be sufficient to test and fix his liability, and as thus establishing a waiver of the rule of legal diligence. But if this be so, we suppose that if a waiver of the ordinary rule of diligence is necessary to sustain the promise, it would be necessary to aver the waiver in pleading, even if the promise should be deemed sufficient, with the other circumstances stated, to establish it in evidence, as is the case with regard to the averment of a request, as necessary to support the promise in pleading, though it may be implied in evidence.

The second count does not aver a waiver of legal diligence, and the question is whether it shows a sufficient consideration for the alleged promise. It avers that the defendant in consideration of his liability, as assignor, &c., promised, at various times during the

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pendency of the chancery suit, to pay, &c., and that the plaintiff relying on this promise did not sue further. If the defendant was in fact liable when the first promise was made, that liability, it is admitted, was a sufficient consideration for the promise. But it is assumed in the argument, on his part, that he was not liable. The declaration, however, must be considered as averring, by necessary implication at least, though not as explicitly as might have been done, that he was liable. And the propriety of assuming the contrary on the demurrer, depends upon the question whether it was necessary to aver all the circumstances which showed his liability. For if it was, the cirsumstances not being shown, the liability not appearing, is taken as not existing. But the liability of the defendant, as assignor, is not the foundation of the action, but merely the consideration of the promise on which it is founded; and is, therefore, in the nature of an inducement, which need not be circumstantially alleged, as in the case of an action upon a promise to pay the debt of another, or the previous debt of the promiser, and even in *indebetatus* assumpsit for goods, &c., sold and delivered, the particulars need not be stated. Here it appears that the relation of assignor and remote assignee existed between the parties, implying a contingent liability in the former to his immediate assignees, which would be available to the remote assignee, and which it was his interest and duty to fix by reasonable diligence. And it appears that the suit in chancery was brought certainly before there had been any negligence with respect to the last note, which was not then due for about a year, and probably before there had been any discharge by negligence with respect even to the first note, which had not been due a month. Then, without referring to the other circumstances before mentioned, which render it probable or easy to infer that the assignor was to continue liable, are we to assume the liability in consideration of which the promise is alleged to have been made, was absolutely determined before the first promise?

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MARUD vs TYLER.

The declaration might have averred that the first promise was made when the plaintiff might have sued on the first or on the second note in time for judgment at the first court, and this would have been more satisfactory. But we are inclined to the opinion that the averment that the defendant, in consideration of his liability, as assignor, promised, should, when taken in connection with the other facts stated, be deemed sufficient to repel the presumption that the promise was made after the defendant, who must be presumed to have understood his own situation and responsibility, had become completely discharged from liability; and in this view the second count is good.

If a party make a promise in consideration of a moral obligation which he *may* waive, he is bound to perform: (*Kent*, 5 *ed.* 113; *Chit. on Con.* 47, *note* 3; *Bank Ky.* v *Ray*, 3 *B. Mon.* 510,) not inconsistent with *Ralston* v *Bullett*, 3 *Bibb*, 102.

But if this view be incorrect, still the question remains whether if the defendant was discharged from liability, as assignor, by the failure to sue the obligor at law, he might not waive this discharge and make a promise, which being founded at any rate on a moral obligation arising from his assignment of the notes for a valuable consideration, and certainly enhanced by the circumstances, already more than once referred to, would be legally obligatory upon him. We admit that such a promise, if made in ignorance and mistake of his rights and under the belief that he was legally liable where in fact he was not, would not be binding. But such ignorance and mistake are not to be presumed, but if relied on, must be shown by the party claiming the benefit of them. And we are of opinion that unless the promise was made under the mistaken supposition of liability, that is, if it was made with a knowledge of the facts and the law, there was a sufficient consideration to support it, though made when the defendant was no longer subject to a legal liability as assignor.

It is expressly laid down in *Chitty on Contracts, p.* 47, that on the ground of a moral obligation, and that a party may waive rules of law introduced for his own benefit, a party to a bill who is discharged for want of due notice of its dishonor, is liable if he subsequently promised payment. And the text is supported by various cases referred to in note O, on the page above ci-

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ted. The principle implies that the promisee should have knowledge of the fact of want of due notice; but this knowledge may be inferred from the promise and attendant circumstances without express affirmative proof: (3 *Kent's Com. 5th ed.* 113; *Chitty on Con.* 47, *note a* 3, *and cases there cited.*)

This principle is, as we think, just and salutary and conformable to the general doctrines of the law. It seems to be recognized, impliedly at least, in the case of the *Bank of Kentucky* vs *Ray, &c.*, (3 *B. Monroe*, 510,) where the question of liability is put mainly upon the ground of ignorance or knowledge of the facts and law; and it is not inconsistent with the case of *Rallston* vs *Bullitt*, (3 *Bibb*, 102,), where the pleas showed that the new liability had been assumed under the supposition of an existing legal liability.

We are of opinion, therefore, that the second count is good, and that the Court erred in sustaining the demurrer thereto.

Wherefore, the judgment is reversed, and the cause remanded with directions to overrule the demurrer to the second count, and for further proceedings.

Williams & Graves for plaintiff; *Guthrie & Tyler* for defendant.

Growning & Co. *vs* Behn, &c.

CHANCERY.

APPEAL FROM THE HICKMAN CIRCUIT.

Case 101.

Mortgages. Vendors' Lien. Equities. Purchasers.

JUDGE SIMPSON delivered the opinion of the Court.

July 4.

Case stated.

R. GROWNING & Co. exhibited a bill in chancery to foreclose a mortgage executed to them on the 26th January, 1841, by F. W. Behn on lot No. 3, in the town of Hickman, to secure the payment of a debt of six thousand dollars, due to the complainants by the mortgagor.

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Growning & Co. vs Behn &c.

During the pendency of the suit, Smith and others upon petitions filed by them for the purpose, were made defendants, and in their answers, which they make cross-bills, they allege that the lot No. 3, mortgaged to the complainants in the original bill, was sold to the mortgagor, F. W. Behn, by Lonsdale and Belknap, who executed to him a deed of conveyance for it, reciting on its face the payment of the purchase money, when in fact the sale was made on time, and notes executed by the purchaser for the purchase money, which notes have never been paid, but have come to their hands by assignment, and by virtue thereof, they have the vendor's lien, and, therefore, entitled to priority over the mortgagees of the purchaser.

The complainants in the original bill resist the lien thus asserted upon two grounds. First, that the notes assigned were not executed for the price of the lot No. 3, but upon a joint sale of said lot and a large stock of merchandise, sold by Lonsdale and Belknap to F. W. Behn. Secondly, that they are themselves purchasers for a valuable consideration, without any notice that any part of the purchase money remained unpaid at the time they obtained their mortgage.

Complainants in cross bill assert a lien as vendors upon land mortgaged to complainants in the original bill, which is sought to be foreclosed by the original bill. Complainants in their answer to the cross bill say that the lot mortgaged was bought with a large stock of goods, by the same contract—and deny the lien, & that the lot is not paid for. Held that without proof the lien asserted could not be decreed upon such answer.

1. The deed from Lonsdale and Belknap is not in the record, but as the parties admit in the pleadings its execution, and that it acknowledges the payment of the purchase money, its absence cannot operate to the prejudice of Growning & Co. The complainants in the cross-bills can have no lien upon the lot until they establish the fact, that the notes assigned to them, were executed for the purchase money, due on its sale by Lonsdale and Belknap to F. W. Behn. There is no evidence of this fact in the record. It is denied by the mortgagees in their answer to the cross-bills filed by the assignees. The answer, it is true, contains a qualified admission on the subject, that is, that the notes were executed for the price of the lot, and also a large stock of goods sold at the same time, but denies, in express terms, that they were executed for the purchase money of the lot alone. This admission, however, did not authorize a decree to

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any extent in favor of the complainants in the cross-bill. The whole amount could not be decreed to them, because it was not embraced by the admission; nor would any part of their demands be decreed to them, there being nothing to show what part of the debt, for which the notes were executed, was for the purchase money of the lot. It was incumbent on the assignees to present their claim in such an attitude that the Court would render a decree for it in their favor, and having failed to do it, they were not entitled to any priority on account of the vendor's lien claimed by them, nor could the Court properly render any decree for them on the claim thus defectively presented.

When a mortgagee at the date of his mortgage is ignorant of a vendor's lien, & the vendor has conveyed by deed reciting the payment of the consideration, the vendor's lien is lost.

2. There is no testimony that the mortgagees, at the time of the execution of the mortgage, were apprized that the purchase money for the lot was unpaid. The deed made to the mortgagor, acknowledged its payment. They were under no obligation to enquire any further into the fact. They deny positively that they had any notice upon the subject, and state they believed that the whole of the purchase money had been paid. Their statement in relation to the execution of the notes for the price of the lot, and also some merchandise sold at the same time, is founded, as they allege, on information subsequently acquired. On this ground, therefore, as well as on the previous one, the lien claimed by the assignees was unavailing against Growning & Co., if their mortgage was in other respects legal and valid, and conveyed to them the legal title to the lot.

As between equities the elder must prevail.

But it is contended that if the lien asserted by the assignees, as such, has not been established, that still they are entitled to priority over Growning & Co. by virtue of a mortgage executed by F. W. Behn to Lonsdale on the 6th day of July, 1841. This mortgage was executed subsequently to the one set up and relied upon by the complainants in the original bill; but a precedence is claimed for it upon the ground that the first mortgage had no seal attached to it, and as it was executed before the passage of the act dispensing with

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Growning & Co. vs Berry &c.

seals in the execution of such instruments, it is contended that it is invalid, and did not operate to pass the legal title to the mortgagees, but at most invested them with an equity alone to the lot contained in the mortgage. In relying upon this ground, however, the fact seems to have been overlooked, that the mortgage to Lonsdale, for which a preference is claimed, is liable to the same objection, it also having been executed without a seal, so that if neither instrument creates any estate but a mere equity, the rule that the oldest equity must prevail is decisive, as between them, in favor of the claim under the first mortgage.

A mortgage appearing to have a seal attached, was recorded without the scrawl or seal upon the record. Held that a party objecting to it for want of a seal is bound to show that there was none at the time of recording.

It seems to us, however, that the first mortgage had a seal affixed to it when it was executed. The original mortgage is exhibited—a seal is attached to it—and the testimony conduces strongly to prove that the word seal, inside of the scrawl, is in the handwriting, either of the individual who wrote the deed or of the mortgagor. The proof is, that their handwriting bears a close resemblance. If it be the handwriting of either, the presumption is strong, that the seal was to the deed at the time of its execution. As the mortgage purports to have been signed and sealed, and actually has a scrawl attached as a seal, it devolves upon those who assert that it was executed without a seal, to demonstrate the fact to be so. To do this a copy of the mortgage from the record is relied upon, by which it appears that the seal was not recorded as a part of the deed, and the testimony of the deputy Clerk, who recorded the deed, is taken, and he proves that, in his opinion, there was no seal to the mortgage at the time it was recorded, and if there had been a seal to it, that it would have been so recorded. It is evident, however, that he recollects nothing about the original mortgage and bases his testimony alone on what appears upon the record. We do not consider the absence of the seal on the record as evidence sufficient to disprove the existence of a seal at the time of its execution, inasmuch as the original deed not only purports to be, but is really a sealed instrument, and the testimony on

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the point leaves scarcely any room for doubt that a seal was affixed to the writing when it was executed.

But whether the mortgage was or not sealed, the right of Growning & Co. to have the balance due them first paid out of the proceeds of the sale of the lot, is clear and indisputable, inasmuch as the assignees of the notes failed to prove that they were executed for the price of the lot in question.

Wherefore, the decree is reversed and cause remanded that a decree may be rendered directing the payment of the balance due to Growning & Co. before the assignees of the notes on F. W. Behn are allowed to claim any part of the proceeds of the sale of lot No. 3, and for further proceedings consistent with this opinion.

Hewitt for appellants; *Fry & Page* for appellees.

Orr *vs* Foote, &c.

EJECTMENT. 10 B. M. 387 11 B. 987

ERROR TO THE KENTON CIRCUIT.

Case 102.

Constitutional Law. Covington. Practice.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

July 5.

THIS action of ejectment presents a contest as to the true position of the southern boundary line of the original town, now city, of Covington, near the extreme termination of that line on Licking river. The land in controversy consists of two adjoining parcels, lying on or near the river. If the disputed line runs as contended for by the lessors of the plaintiff, one of these parcels is on the north side of it, and is within the boundary of the original town of Covington, at the southeast corner of the town; and the other parcel is just outside of said boundary in the northeastern corner of the tract adjoining the original town and part of what was formerly the Kyle tract. On this hypothesis, the title to the first of these parcels was vested in the trustees of Covington by the act of 1815 establish-

Case stated.

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Orr vs Foote &c.

ing the town, and has passed to their successors, the President and Council of the City of Covington, unless it has been conveyed by the town or city authorities by valid conveyance. And on the same hypothesis, the second is the same half acre which is excepted in the conveyance from S. E. Foote to the defendant Orr, as having been conveyed by said Foote to C. H. Winter, one of the lessors; and the title is either in said Foote, to whom Kyle's title passed by regular conveyances, and who is one of the lessors, or it is in Winter, who claims under a deed from Foote.

The defendant Orr claims that the disputed line is considerably north of that contended for by the plaintiff, and so far north of it as to exclude the northern parcel in contest from the original town of Covington, and also to include the half acre which is to lie on the line within the first parcel, when in fact it was surveyed and is claimed by Winter as lying adjoining it on the south.

The question presented by the record.

The jury having found for the plaintiff on the demises of the city of Covington and of S. E. Foote, the verdict establishes, as between these parties, the line as claimed by the plaintiff, and his right of possession in both parcels. And the instructions, so far as they are understood, being at least as favorable to the defendant as the law would allow, the sole question on the merits of the case is, whether the finding is authorized by the law and the evidence. Upon the evidence before the jury, we need not remark further than to say that if it did not conclusively establish the line as claimed by the plaintiff, it at least authorized the verdict, which having been approved by the Circuit Court, cannot be disturbed by this Court whatever might be its opinion as to the mere weight of the evidence.

The act establishing the town of Covington was decided constitutional: (*Kennedy's heirs* vs *Trustees of Covington*, 8 *Dana*, 55–6.)

That the act establishing the town of Covington is constitutional, and vested the legal title to 150 acres therein described in the trustees, was decided in the case of *Kennedy's heirs* vs *Trustees of Covington*, (8 *Dana*, 55–6.) And although the tract of 150 acres referred to in the act was not all laid out into lots and

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streets at that time, yet as it vests 150 acres in the trustees for the town, their title extended to that quantity, and the memorandums or endorsements on the original plat show that any surplus not vested in the trustees should be on the western side of the tract, and that consequently the title of the trustees covered the southeastern corner, and included the first parcel of the land now in contest, if it is north of the line dividing the Kennedy tract, on which the town was established, from the Kyle tract. If the trustees were authorized to convey that part of the town tract not laid off into lots at the date of the act establishing the town, (approved February 1815,) then their deed to the three Ganoes, in 1824, invested them with the legal title to the first parcel of land above described as being now in contest, and by subsequent deeds, the title was concentrated in Daniel Gano, and afterwards transferred by the proceedings on his mortgage to Winter, one of the lessors. The Court decided in favor of the defendant, that the power of the trustees to convey as given by the original act, was limited to the lots originally laid off, that consequently, if this parcel was within the town tract, the title still remained in the town authorities. The verdict as to this parcel was accordingly found upon their demise and not upon that of Winter. This question is no otherwise materal, at present, than as it relates to the condition on which the plaintiff was allowed to amend the declaration by adding a demise on the title of the city; which condition was that there could be no recovery under that demise, unless the plaintiff showed an equitable title to the land from the city, which is understood to mean such equity to the land as the city was bound to respect. And so it seems to have been understood by the Court and the parties. This equity, as against the trustees, must be regarded as being sufficiently established by their deed to the three Ganoes, unless that deed be regarded as not only insufficient to pass the legal title, because not expressly authorized, but as being actually illegal as being against the objects and policy of the act, and the pur-

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ORR vs FOOTE &c.

poses for which the title was vested in the trustees. But as the deed does not convey any land which was either expressly or impliedly reserved for public uses, the deed cannot be regarded as in violation of any policy or purpose of the act, unless it tended to deprive either the town or the original proprietors, or their representatives, of some right or benefit which was intended to be secured to them. But as this ground was certainly not intended to be forever reserved from private ownership, and as the act is sedulous to secure the interest of the original proprietors, whose land was vested in trustees for the purpose of a town, it would seem to be entirely consistent with every object of the statute, and not only promotive of, but actually essential to the interests of the town and of the proprietors, that the title to this portion of the town tract should not remain in abeyance, but should be so placed in individuals as that it might be improved, and for that purpose transferred from one to another, subject to the general powers and authority of the town and its trustees. In this view of the question, we are of opinion that although no express authority is given to the trustees to convey any thing but the lots as laid out; yet as the Legislature may have understood this description, as embracing the whole extent of the tract, and as there is nothing to show the contrary, and the entire title is vested in the trustees without any negative words restricting the power of conveyance, we are of the opinion that if they could not pass the legal title to portions of the town not laid off into lots, they might at least pass such right or power to the original proprietors or their heirs or assignees, as the trustees themselves would be bound to respect, and as might authorize the grantees to use the respective portions in a manner appropriate and advantageous to the town and to themselves as proprietors. If this could not be done, for what purpose was the title of these portions of the tract vested in the trustees instead of being left in the proprietors? It was obviously not intended to deprive them of any interest or even title, except so far as was necessary

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for the town. The act was doubtless procured by them, and certainly assented to immediately after its passage, as is demonstrated by the documents and other evidence in this record. They established the town with a view to the profits to be derived from the enhanced value of the land, and it cannot be presumed that they would have consented that portions not intended for public use, and thus tending to produce the expected enhancement, should be withheld from them for an indefinite period without the power, either in themselves or the trustees, to make them profitable to them, or in any way advantageous to the town. And the Legislature had no motive for doing so.

The act establishing the town of Covington vesting in them 150 acres of land, and authorizing them to convey the lots laid off, authorised them to sell parts of the 150 acres not laid off and which was not intended for public purposes, and such sale passed an equity at least to the purchaser.

We are, therefore, of opinion that the deed of the trustees to the three Ganoes, who were the devisees of one of the original proprietors, conveying this ground to them in virtue of that title, and of recitals showing their right, so far as the original proprietors and their heirs or alienees were concerned, to have it in exclusion of others; and which recitals are substantially sustained by deeds between the several proprietors and their heirs and alienees, was such an act, as if it did not pass the legal title, at least created or sanctioned a right which the trustees and their successors were bound to respect, and, therefore, constituted such an equity as is referred to in the order allowing the additional demise, and as authorized the grantees to use and transfer the land in subordination to the general authority and title of the trustees. The long acquiescence of the other proprietors and their heirs and their alienees in the deeds and acts referred to, as concentrating in the three Ganoes the entire interest in the land now in question, confirms the recognition of their right by the deed of the trustees, and affording sufficient presumption of the validity and obligatory force of those previous acts and deeds, stated in the deed of the trustees and which, at the time of the trial, had been acquiesced in and acted under for more than twenty four years without dispute. We do not, therefore, deem it necessary to notice in detail the objections to the admissibil-

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ty of these several deeds, which are only subsidiary to the deed of the trustees. The subsequent deeds by which the interest of the three Ganoes was concentrated in one of them, were properly authenticated, and are, moreover, sustained by the acts done under them and the acquiescence of other parties. This interest as already observed was vested by the proceedings on the mortgage in C. H. Winter, one of the lessors, who if he had not the legal title, had such interest as entitled him to use the title of the city for his benefit.

A writing showing the true position of a line as agreed upon between those who were the proprietors at its date, may properly be received as evidence to show the proper line, and is binding upon all subsequent owners of the land.

It is proper before leaving this part of the case to notice an exception taken to the admission of a part of the evidence relating to the question of boundary. This was a writing dated in May 1815, purporting to be an agreement between the proprietors of the town tract and Kyle the proprietor of the farm and land adjoining it on the south, whereby the line between the two tracts, which was the original line of the patent under which the town tract was held, was definitely agreed on and run, and at certain points marked or defined on the ground. There is no doubt that this writing, as the act and admission of Kyle, then the absolute owner of the land on the south side of the disputed boundary, was evidence of the true position of that boundary against him, and all persons subsequently deriving title from him, and the Court properly treated it only as evidence of the true line, and not as in itself fixing a different line so as to extend the town of Covington to bind subsequent purchasers who had no notice of it. And although formal proof of the execution of the instrument was not made by the subscribing witness when it was first offered, and it may have been admitted on account of its age and of its having been in the custody of the agent of the proprietors, yet as the subscribing witness afterwards referred to it and to its execution in such a manner as to identify it and establish its genuineness, which was also corroborated by other evidence of recognition and of possession corresponding with it, we are of opinion that there was no error in admitting it, either as an ancient writing, or as an instrument

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proved by the subscribing witness. Indeed it would seem that the objection was rather on the ground of irrelevancy than of non-execution, or of want of proof of its execution.

Title papers offered by a defendant in ejectment which are incompetent to show title, may be used by plaintiff to show title in him.

With respect to the half acre south of the disputed line, it seems entirely manifest that, fixing the line as the jury have done, this parcel of land is situated immediately south of it, on or near Licking river, and that being certainly included in the conveyance by which the title derived from Kyle was vested in S. E. Foote, and being excepted out of the conveyance of a part of that land by Foote to Orr, the title is either in Orr or in Winter, both of whom are lessors by separate demises. The plaintiff, therefore, was entitled to recover on one of these demises and for the benefit of Winter, if the deeds showing title in Foote were properly before the jury. These deeds were first offered by the defendant, but being objected to by the plaintiff, so far as used for showing title in the defendant, they were allowed to be read, and were read by the defendant merely to show boundary. The plaintiff then offered to use them as evidence to show title in himself, to which the defendant objected, and, thereupon, asked leave, and was allowed to withdraw them from the jury as evidence for any purpose; and notwithstanding his objection, the plaintiff was allowed to use and read them as evidence of title on his part. We do not understand that the Court coerced any delivery or surrender of the deeds from the immediate or actual or personal possession of the defendant. But that the deeds having been read by the defendant were among the papers of the cause when the plaintiff offered to read and use them, and that they so remained when the motion of the plaintiff to use them was granted. Thus viewing the facts, we cannot say that there was any such injury offered to the rights of the defendant, as should constitute a ground for a new trial or for a reversal of the judgment. The whole effect of a new trial, so far as this matter is concerned, would be that the plaintiff would be compelled to furnish the deeds, &c., at his

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own expense, (or copies,) and as he should have done on the trial which has occurred The defendant might perhaps, in justice, insist that he should take and pay or the copies which were used, and the Court might have imposed this or other conditions. But we do not think any thing occurred which should affect the judgment.

Wherefore, the judgment is affirmed.

Stevenson and J. & W. L. Harlan for plaintiffs; *Lindsey* for defendants.

DETINUE.

Case 103.

Myers *vs* Daviess.

ERROR TO THE JEFFERSON CIRCUIT.

Conditions precedent and subsequent.

July 6. JUDGE SIMPSON delivered the opinion of the Court.

The case stated.

J. H. DAVIESS, by his last will, vested his whole estate, real, personal and mixed, in John Rowan and Jas. Meade and the survivors of them, and in such trustee as such survivor should appoint by deed or will; and if they died without making such appointment, then Samuel Daviess and Daniel Gross, or the survivor of them, were to be his trustees. The estate was vested in trust, that the trustees might pay the testator's debts and comply fully with all his contracts. They were to appropriate a part of the estate for the support of the testator's wife; and when the testator's nephews, the sons of William Daviess, Samuel Daviess and John Daviess grew up, the trustees were to divide the estate into not more than three parts, and to give it to such of his nephews as they deemed most worthy. They were authorized to give the entire estate to one, if they thought proper to do so, or to two, but not to more than three at farthest. If the execution of the will should devolve upon Samuel Davis, his son was to have no share of the estate.

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After the death of the testator, the widow renounced the provisions of his will in her favor, and claimed and received dower in the estate.

The testator died in 1811. Meade, one of the trustees, died in 1812. Rowan died in 1843; and Gross, one of the second set of trustees, died previous to Rowan. No disposition of the estate, at the time of Rowan's death, had been made to any of the testator's nephews. Nor had Rowan appointed a trustee to manage the estate, and consequently the execution of the trust devolved upon Samuel Daviess, the only surviving trustee named in the will.

In 1843, after Rowan's death, Samuel Daviess, by deed duly executed, appointed one of the testator's nephews, namely, Joseph Hamilton Daviess, son of John Daviess, sole devisee under the testator's will, giving to him the whole estate, with full power and authority to take, occupy and enjoy it according to the provisions of the will. But the deed of appointment contains a condition by which the said J. H. Daviess is required, within four months from the date of the deed, to execute and deliver to Samuel Daviess a deed, in writing, releasing and discharging the heirs and legal representatives of John Rowan and James Meade, the former trustees and the sureties in their executorial bond, and their agents, Samuel Daviess and John Daviess, who had acted under said trustees, from all claim or demand or suits on the part of J. H. Daviess, the selected devisee, for or on account of any alleged defalcation or mal-administration of said estate, or for any other cause whatever.

In the assignment of dower to the widow she received several slaves, as her dower interest, in the slaves that belonged to the testator's estate. In the year 1822 a judgment was confessed by Rowan for the sum of $726 68 in a suit previously brought against him as the executor of J. H. Daviess by Jacob Philips; and the execution that issued upon that judgment, being against Rowan as executor, and to be made of the assets in his hands, was levied upon the reversionary interest of

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the dower slaves, which was sold under the execution in the year 1823, and purchased by Joseph Pollard, who had previously married the widow, and then had the slaves in his possession in right of his wife.

The dower interest in the slaves ceased and determined in the year 1847 by the death of the widow. After her death this action of detinue was brought by J. H. Daviess, the appointee under the will, to recover the dower slaves against those claiming by virtue of the purchase of the reversionary interest at the sale made under the execution by the Sheriff. Myers had the slaves in possession when the widow died, and the parties agreed that he should hold them merely as a stakeholder, and this suit should be brought against him for the purpose of trying the right, but he should not be liable for the costs, nor for the negroes.

Where a testator appoints a person to execute his will, conferring upon him the powers and rights which appertain to an executor, it amounts to a constructive appointment of such person to the office of executor, though he be styled a trustee: (1 *Williams on Executors*, 123.)

Questions in the case.

The testator did not in his will nominate an executor in express terms. But as he confided to the persons whom he denominated trustees the execution of his will and conferred upon them the rights which appertain to an executor, it amounts to a constructive appointment of them to the office, and although called trustees by the testator, they were also his executors *according to the tenor* of his will: (1 *William's on Executors*, 123.)

The plaintiff's right of recovery in this action is contested mainly upon two grounds. First, that the deed of appointment under which he claims is invalid, inasmuch as it contains a condition intended to operate for the benefit of the trustee by whom it was executed, and upon the performance of which the vesting of the estate depends. And, furthermore, that the deed, if valid, did not invest the plaintiff with the legal title to the property, which still remained in the trustee after the execution of the deed.

Second, that the Sheriff's sale under the execution against Rowan, as executor, transferred the reversionary interest in the slaves, after the termination of the dower estate, to the purchaser, and consequently the plaintiff has no title to them.

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1. The objection to the appointment of the plaintiff as devisee, is founded on a misconception of the nature of the condition contained in the deed by which he is designated as the person who is to take under the will. It is not a precedent condition that must be performed before the estate vests, but a condition subsequent, the performance of which is not essential to the vesting of the estate. If the condition be illegal, it does not vitiate the deed of appointment, or defeat the estate which it confers, although the condition itself may be void and inoperative. And as the deed designates the plaintiff as the person who is to take under the will, and invests him with all the rights of a devisee, with power and authority as such, to take, occupy and enjoy the estate according to the provisions of the will, the title to the slaves which belonged to the estate vested in him, nothing more being necessary to the completion of his title, after his appointment as devisee, than the assent of the trustee and executor, that he should take the slaves and hold them in that character.

If the condition annexed to a conveyance be *subsequent*, the estate passes, though the condition be not performed—so if the condition be illegal.

2. The effect of the Sheriff's sale depends upon the question whether the reversionary interest in the dower slaves remained in Rowan, as trustee and executor, at the time of the sale, and whether such an interest in the slaves was assets in his hands and liable to sale by execution?

Where a testator devised the whole of his estate to trustees, and the widow renounced the provision made for her by the will, and had dower assigned in slaves which were embraced by the will: Held that the trustees were only divested of title to the extent of the dower interest, & the reversion remained in the trustees, and liable for debts.

The will vested the title to the whole of the testator's estate in the trustees. The renunciation of the will by the widow and the assignment of dower to her, only operated to divest the title of the trustees to the extent of the interest which the law conferred upon her in the property comprised in her dower estate. The title to the life estate in the slaves was, by operation of law, vested in the widow. The title to the estate, in reversion, remained in the trustees by virtue of the provisions of the will. It could not vest in the devisee, because no person had been selected to take in that character. Although, by the assent of the executor that the widow should hold the slaves in dower, his title was divested during the continuance of her life

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estate, and to that extent the slaves were not assets in his hands; yet as that assent did not either expressly or by construction vest the reversionary interest in any other person, the entire title did not pass out of him. In this respect, this case differs from that of *Anderson* vs *Irvine*, (6 *B. Monroe*, 231.) There the administrator, by permitting the widow to take the slaves in dower, was considered as having surrendered them to her and the heirs, and thereby divested himself of all title to them. Here the surrender to the widow could not have that effect, because no assent by the executors could be implied that the heirs should take the reversionary title, inasmuch as they had no right to the slaves; and as the executors were the only devisees until others were appointed by them, the title, except so far as it was divested by the widow's life estate, remained in them, there being no other person in whom it could vest.

Slaves devised to executors in trust to be given to such other persons partially designated as the trustee should select, remain with the trustee until disposed of according to the trust, and liable to execution upon judgment against the trustee as executor.

The title to the slaves and personal estate would, by operation of law, have vested in the executors even if the testator had not expressly devised his estate to them. Their title to that part of the estate under the will, was precisely the same that they would have had if there had been no devise of it to them. It was, therefore, liable to be taken and sold under executions against them as executors. It was assets in their hands and remained such until its character was changed by alienation, or some other act which produced a similar effect.

The surrender of the slaves to the widow in dower changed the character of the property to the extent of her interest in it, because that far the title to it had been given up by the executors. But it still continued to be assets in their hands, so far as the title remained in them, and as such was liable to sale under execution.

It is contended that a sale of the reversionary interest in slaves, under such circumstances, should not be sanctioned, it being against the policy of the law, and injurious to the rights of the reversionary proprietors. It is no doubt the duty of an executor to apply the as-

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That an executor may lay himself liable for a devastavit in not properly administering, will not affect the right of a purchaser of property sold to pay debts which is liable.

sets in his hands to the payment of the testator's debts, and a surrender by him to the widow or devisee of any part of the assetts until the debts have been paid, is a breach of that duty, for which he might be held responsible by either a creditor or any other person interested, who had been injured by the act. But still a creditor has a right to sell the title to the reversion, which being in the executor, is assets in his hands and liable to execution. The fact that the creditor has a remedy against the executor for a *devastavit*, does not deprive him of his right to sell the assets still remaining in the hands of an executor, and thus avail himself of that remedy which is most speedy and direct.

The slaves were levied upon, and the reversionary interest in each one sold separately. There does not seem to be any objection made to the manner in which the sale was effected. The title in reversion passed to the purchaser by the sale. Whether that title, acquired under the circumstances it was, by the husband of the widow, and apparently for her benefit, should be deemed to be held in trust for the plaintiff, is a question of equitable cognizance that does not arise in this action at law, and the solution of which may depend not only upon the relative attitude of the parties, but also upon the liability of the widow to have paid the judgment at law against the executor, to satisfy which the sale was made, if such a liability existed in consequence of her having the estate in her hands that should have been applied to its payment, and which instead of retaining, she ought to have surrendered to the executor for that purpose. But whether such a liability existed or not, or its effect upon the sale if it did exist, are matters not now before the Court for adjudication, and about which, therefore, no opinion is now expressed.

It is unnecessary to notice the minor points made in reference to the admissibility of testimony, as the judgment will have to be reversed on the ground that the instructions by the Court below to the jury, upon the subject of the sale of the slaves under execution, were not in accordance with the principles of this opinion,

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PLACE &c. *vs* OLDHAM'S AD'R. &c.

and the same questions, in all probability, will not rise upon a future trial.

Wherefore, the judgment is reversed, and cause remanded for a new trial, and further proceedings in conformity with this opinion.

Fry & Page for plaintiff; *Loughborough & Ballard* for defendant.

CHANCERY.

Case 104.

Place, &c. *vs* Oldham's Adm'r., &c.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Administrators. Substitution. Pro rata distribution.

July 9. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated. R. P. OLDHAM, in his lifetime, executed his note to Kleissendorff & Fuist for $500, which was assigned by them to T. M. Tunstall. A judgment was obtained in 1837 by Tunstall against Oldham for the amount of the note, with interest and costs, and execution thereon was returned "no property found," except as to the sum of $52 49 made upon it. Afterwards, in 1840, Kleissendorff having previously died, Tunstall in a suit upon the assignment recovered a judgment against the administratrix and heirs of Kleissendorff for $493 51, bearing interest from the date of the judgment, which was satisfied out of the estate descended to the heirs, in which the administratrix, as widow of the decedent, was entitled to dower. And she having intermarried with Place, and Oldham having died in 1837, shortly after the judgment and execution against him; this bill was filed in 1847 by Place and wife, as administratrix in conjunction with the heirs of Kleissendorff, against Haggin, the administrator of Oldham, and his securities, claiming the benefit of the judgment against Oldham by substitution to the rights of Tunstall, who is made a defendant; and after suggesting that assets to a considerable amount had or should have come to the hands of the administrator, and charging that he had

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notice of the said judgment and proceedings against his intestate, and that he had appropriated the assets to his own use, and retained them in part for his own debt, disregarding the priority to which said judgment was entitled, and with full notice thereof; prays for a discovery and account, and for a decree against Haggin and his securities for the amount due on the judgment against his intestate, and for general relief. Haggin denies all notice or knowledge of the judgment against Oldham until within two or three years before this suit was commenced. He states the amount of assets received at a little less than $800, which he alleges he has duly and fully administered, and he denies that the demand of the complainants is entitled to any priority over those which he has paid and his own which he has retained out of the estate.

It appears that Oldham died in Jefferson county, where he had lived for a number of years; that Haggin lived in the same county, and had ample opportunity of knowing the condition of Oldham, and of knowing of the judgment and proceedings of Tunstal against him; that Haggin was appointed administrator by the Jefferson County Court in November 1837, received shortly afterwards near $800, due to Oldham from the State of Kentucky, which in the course of about one year he disbursed in payment of funeral expenses, of judgments against the intestate, and of his own demand $300 with interest, due by note, and a demand also due by note, in which he was the surety of Oldham, on which he paid about $80. No inventory or appraisment had been returned by the administrator, and he had not accounted or settled with the County Court.

An administrator paying bond debts or simple contract debts of his intestate, when judgment debts existed in the county the intestate had lived and died [illegible] personally liable for a mal-admin-

As the law stood when this administration was granted, and when the assets were appropriated by the administrator, judgments against the intestate, subsisting and in full force at his death, were entitled to priority over specialties and simple contracts in the administration of the assets, and a violation of this right of priority was a mal-administration, constituting a *devastavit*, for which the judgment creditor, whose debt re-

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PLAGE &c. vs OLDHAM'S AD'R. &c.

istration: (*Hutchcraft's Ad'r., vs Tilford, 5 Dana* 353.)

mained unpaid, might hold the administrator personally liable, unless the administrator had not only been ignorant in fact of the existence of the judgment, but was not bound to know or take notice of it: (*Hutchcraft's adm'r* vs *Tilford*, 5 *Dana*, 353.) And in the case referred to, it was decided upon full consideration of the question, both on principle and authority, that according to the principles of the common law, an executor or administrator was bound to take notice of judgments against the intestate in the same county in which he had lived and died, if the judgments themselves were alive and enforcible by execution at the time of his death. We are not aware that the principle has, in any subsequent case, been departed from or even doubted. And as it imposes no unreasonable task on the administrator, we see no sufficient reason for questioning its propriety or its application to the present case.

Under this principle the administrator has no right to leave this judgment of Tunstal's against his intestate unsatisfied and appropriate the assets to the payment of his own debt, due by note, and of another of the same dignity, in which he was surety. And as he was bound to take notice of this judgment, and is chargable, in point of law, with all the consequences of actual notice, whether he had it or not, it follows that in view of the law, he is chargable with the amount of the assets appropriated to the two debts just referred to, as if they had not been so appropriated, but remained in his hands unadministered. And as they never were duly and legally administered, but in legal contemplation remained in his hands as assets to be appropriated in the due course of administration, Tunstal, as a judgment creditor, might unquestionably have coerced their appropriation to his demand by reviving his judgment and suing for a *devastavit* if the assets were not applied to its payment. And we are inclined to the opinion that he might at once have resorted to a Court of Equity for a discovery and a due application of the assets.

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But instead of pursuing the estate of Oldham either at law or in equity, Tunstal turned upon the representatives of his assignor, and coerced from them the consideration which he had paid for the assignment, whereby, as we apprehend, they became in equity entitled to the benefit of the judgment and invested with his rights therein. And if a Court of Law might so far regard this equitable right as to allow them to proceed in the name of Tunstal for their benefit to revive the judgment against his administrator, and to institute and carry on an action for a *devastavit*, if an execution on the judgment should prove unavailing, yet, we are of opinion, that as their rights in this respect were not legal but purely equitable, they were entitled to assert them at once in a Court of Equity, without resorting to the circuitous proceedings in the name of another, which would almost certainly have been requisite if they had revived the judgment and proceded by a writ of *fi. fa.* thereon. The assets are not of a character to be reached by execution at law. If the judgment had been revived by *scire facias* for the benefit of the complainants, the administrator, who now contends that he had duly administered the assets, would, in all probability, have withheld payment. And an action for a *devastavit*, or a bill for discovery of assets,&c., must have followed. We think the complainant might properly resort, in the first instance, to the equitable remedy.

Heirs, against whom a judgment has been recovered in conjunction with the administrator, & who pay the judgment, may in equity be substituted to the right which the judgment creditor had, to file his bill against the administrator to have a discovery of assets, and be reimbursed in case there has been a mal-administration of assets.

We have already said that the appropriation of the assets to the note due to the administrator, and to that in which he was surety for his intestate, was an undue administration, and in effect a *devastavit*, and that he remains liable for the same as for assets in his hands unadministered.

But the question still remains whether these assets should now be appropriated according to the rule of priority existing at the time when the administration was granted and the assets administered, or according to the rule of equality subsequently established by the act of 1839, (3 *Stat. Law* 240,) which enacts that there-

—But, where the administrator in such case claimed a bond debt and a debt paid as security for his intestate, & had assets sufficient to pay them at the filing of

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PLACE &c. vs OLDHAM'S AD'R. &c.

the bill of the heirs: Held that though the administration was granted before the act of 1839, that the administrator as to such debts was entitled to a *pro rata* share of the fund so in his hands—he paying interest to the heirs on their part.

after all debts shall be of equal dignity in the administration of estates, and shall be paid as therein declared, ratably, when the assets are not sufficient for the payment of all. This question is not free from difficulty. But the statute does not, by any expression or intimation contained in it, limit its own operation to administrations or letters testamentary granted after its passage, but declares in unqualified terms that "hereafter" all debts shall be of equal dignity in the administration of estates, and shall be ratably paid as thereafter directed. Of course the statute could not operate and was not intended to operate apon assets duly administered before its passage, and did not apply to debts properly paid under the pre-existing laws, and which, therefore, could not be regarded as subsisting debts. But we suppose it was intended to apply to all assets remaining unadministered at its passage, and to all debts which were then subsisting, or might thereafter be asserted against the estate of the decedent. And as we must assume upon this record that the administrator of Oldham was in fact ignorant of the judgment in favor of Tunstal, and that he acted in good faith in applying the assets for his own benefit to the payment of his own debt and of the other for which he was surety, we think there is no reason why he should not be regarded as a creditor to the extent of these debts improperly paid by him, and as being entitled to an appropriation of the assets found to be in his hands or for which he is liable, ratably, with the judgment debt set up by the complainants. And as it is not shown that there are other creditors of the estate, who are entitled to come into the distribution, the consequence is that the *pro rata* appropriation of the assets should be confined to the claims just referred to. As the administrator appropriated these assets to his own benefit, he is chargable with interest from the date of the appropriation, and the several claims now brought into comparison, are also entitled to bear interest until the distribution is made among them—the proportion assigned to the claim of the complainants should bear interest until

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paid. The administrator and his securities are liable for the amount, which should be made out of the assets in the hands of the administrator, or if none, or not sufficient, then out of the proper estate of the administrator and his sureties. And execution should go accordingly.

Wherefore, the decree dismissing the bill without prejudice is reversed, and the cause is remanded with directions to render a decree in conformity with this opinion.

Thruston & Pope for plaintiffs; *Loughborough & Ballard* for defendants.

Shelton *vs* Deering.

CHANCERY.

ERROR TO THE BARREN CIRCUIT.

Case 105.

Femes covert. Dower. Conveyances.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

September 12.

THIS bill was filed by Patsy Shelton to obtain dower in a tract of land which had been conveyed to Deering in 1837 by a deed executed by her husband and herself, and recorded in proper time on the certificate of her acknowledgment and privy examination, made by two Justices of the Peace of the county in which the land was situated, which was also the county in which the parties resided. The husband acknowledged the deed before the Clerk of the same court.

The case stated.

To avoid the effect of this deed as a bar to the claim of dower, two grounds are assumed in the bill: First, that the two Justices were not authorized to take the acknowledgment and privy examination of the complainant; and, second, that if they were, the deed became void by a subsequent alteration made by her husband, with the consent of the grantee, after the acknowledgment of the complainant and before that of her husband.

1. With regard to the authority of the Justices. The fourth clause of the act of 1785, (for regulating con-

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SHELTON vs DEERING.

The act of Virginia of 1785, authorized two Justices of the Peace of the county where the *feme* resided, having a commission for that purpose, to take the acknowledgment and privy examination of a *feme covert* to conveyances—& the statute of Kentucky of 1792, authorized two Justices of the Peace under a commission to take such acknowledgment & privy examination to a relinquishment of dower, in cases where deeds from the husband had been made & recorded from the husband; also, "in all cases where a deed is made by the parties;"—the second section of the act of 1831, having dispensed with the commission, two Justices of the Peace tho' in the county where the *feme* resides, and the land lies, may take such relinquishment & privy examination without commission.

The fourth section of the act of 1785 applies to all kinds of interest, whether dower or right of inheritance, that of 1792 to dower only.

veyances,) (*Stat. Laws*, 433,) authorizes the acknowledgment and privy examination of a *feme covert*, to be taken and certified by two Justices of the Peace of that county in which she dwelleth, if in the United States, who may be empowered by commission to be issued by the Clerk of the court in which the deed ought to be recorded. And the act of 1792, (*Stat. Law*, 436,) after providing, in the third section, that in cases where deeds had been recorded without a relinquishment of dower by the wife of the grantor, she may relinquish her right before two Justices of the Peace in the county, whose certificate of privy examination, &c., shall be recorded, &c., enacts that "in all cases where a deed is made by the parties residing in the county where the land may lie, it shall be lawful for the *feme covert* to relinquish her right of dower in like manner", that is, before two Justices of the Peace in the county. Then the second section of the act of 1831, (*Stat. Law*, 451,) expressly repeals all laws which require a commission to issue to take the relinquishment of dower, or the acknowledgment of *femes* to deeds residing in or out of this State, conveying lands in this State, and declares that all deeds thereafter made and acknowledged in the manner prescribed by law, without such a commission, to be as effectual as if such commission had been issued, &c.

We are of opinion that this case comes directly within the provision of the third section of the act of 1792, as this deed was made by parties residing in the county where the land lay, and the relinquishment was taken and certified by two Justices of the Peace of the same county. We are also of opinion that the case is embraced by the fourth clause of the act of 1785, as modified by the second section of the act of 1831, dispensing with the commission. The provision in the third section of the act of 1792 is applicable to the relinquishment of dower only. The fourth section of the act of 1785 applies to the conveyance or release of any interest which the *feme* may have, and which might be conveyed or released by deed. And the necessity of a

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commission, as therein required, having beeen dispensed with, the acknowledgment and privy examination of a *feme covert*, residing any where in the United States, may be effectually taken and certified without a commission by two Justices of the Peace in the county of her residence. There is no defect in the form of the certificate now before us, and the first objection to the deed must be deemed unavailing.

2. It seems that the deed as originally drawn and executed and acknowledged by the complainant, described the land conveyed by its metes and bounds without naming any quantity; but before it was acknowledged by the husband, he upon objection being made to the omission, inserted or caused to be inserted, the words "containing by survey two hundred acres," as part of the description; and also in the covenant of warranty, which purports to be joint, the words "and that the same shall contain two hundred acres." The question is whether these alterations of the deed have rendered it void as to the wife. Having been made before the instrument was acknowledged by the husband, and with his consent or by his own act, they certainly do not vitiate the deed as to him, but make a part of it as his act, although they make it, as to him, a very different instrument, in legal effect as well as in words, from what it was in its original form.

The alteration of a deed by the husband with the assent of the grantee, after it was properly acknowledged by husband & wife, in a part which did not change its legal effect in respect to the wife, held not to vitiate the deed as to the wife.

Did the alterations, or either of them, change the legal effect of the deed, as the act of complainant? If they did, then, as they were made without her consent, and with the consent of the grantee, we think the whole deed should be regarded as void, so far as the complainant is concerned. But if the legal effect of the deed, so far as she is concerned, would be the same whether the interlineations had been made before or after her execution and acknowledgment of it, that is, if neither her interest in the land nor her liability with respect to it would have been effected by the insertion or omission of the words in question, when done with her knowledge and previous to her acknowledgment of the deed, then as the alteration was not made with

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any view of defrauding or injuring or affecting her, but merely in furtherance of the arrangement and in view of the rights of other parties, and as the alteration would be wholly immaterial in its operation as to her, and was made by the parties between whom it was to operate, we are of opinion that it would not and should not impair the efficacy of the deed as her act and as it existed when executed and acknowledged by her.

The wife uniting in a deed with the husband & relinquishing dower, is not the surety of the husband in the warranty of quantity or of title.

Suppose, then, that the deed had contained the same words when the complainant acknowledged it, which were afterwards inserted, would these words have imposed any liability on her, or would they in any manner have affected her interest in the land? We think they would not. Her execution and acknowledgment upon privy examination, with the subsequent recording of the deed, would have effectually barred and extinguished her dower or other interest in the land contained in the boundary described in the deed, whether the number of acres composed a part of the description or not. And the insertion of the quantity in that part of the deed, certainly could have had no effect upon her interest or liability, unless it could be supposed that by becoming a joint party to the deed with her husband, she could be made liable for the representations which the deed might contain with respect to the land. But although the statutes regulating conveyances declare that a deed executed and acknowledged by husband and wife, and recorded with the proper certificates, shall be sufficient, not only to convey or release her right of dower, "but be as effectual for any other purpose as if she were an unmarried woman;" these general words must be construed with reference to the subject matter, and cannot be supposed to have been intended to enable or permit a *feme covert* to do, by means of such a deed, every possible thing which a person, *sui juris*, might do by means of a deed containing a conveyance of land. If the words are to be understood in their utmost latitude, a husband and wife might, through the instrumentality of a deed conveying land, enable the wife to make any agreement, either

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with the husband or with other person, which an unmarried woman might be competent to make, and the whole law regulating the marital rights and the disabilities of coverture might be changed, or subjected to the will of the parties.

It has been held by this Court, and we think correctly, that a *feme covert*, uniting with her husband in the conveyance of her own land, might bind herself by a warranty in the deed, provided it were properly acknowledged and authenticated. But it has never been held that she could bind herself by a mere personal covenant, collateral to her interest in the land. And where the deed conveys not her land but that of her husband, and she unites merely in consequence of her potential right of dower, it has never been decided that she was or could be bound even by an express covenant any further than to the extent of her interest as doweress. Whether by uniting with her husband in the covenant of warranty, she would be barred from the assertion of any subsequently acquired claim besides that of dower, might present a serious question. In that case, however, the dower interest would be something to which the warranty might possibly apply as a muniment of title. But however that might be, we are of opinion that, unless in the case of a *feme covert* having a separate estate, a wife uniting with her husband in a conveyance of his land, in which she has no interest but the potential right of dower, incurs no obligation by reason of any collateral and merely personal covenant which may be inserted in the deed, and much less by any representation which it may contain. Such covenants or representations, though in form joint, must be regarded as intended to be the acts of the husband alone, and as operative upon him only and not upon the wife, who unites in the deed for the purpose of barring her right of dower, and cannot be presumed to have entered into all the particulars of a contract in which she has so remote and indirect an interest.

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SHELTON vs DEERING.

It was the object of the statutes regulating conveyances to enable the wife, by certain formalities, to relinquish or extinguish her dower right, and to pass any interest which she might have in lands. To enable her to do this effectually, it was probably intended that she might bind herself by such stipulations relating to the land and her interest in it, as are usually required in perfect conveyances. But we do not suppose that it was intended to enable her to become the surety of her husband in the warranty of his title, and much less in any personal covenant which he might agree to insert in his conveyance. The stipulation as to quantity contained in this deed, is of this character. It is not in the nature of a warranty of title, certainly not of the wife's title, but is a merely personal and collateral covenant, by which, even if it had been in the deed when she executed it, she would not have been bound. It is in effect the mere covenant of the husband and must have been so understood and intended. And we think the validity of the deed, as to the wife, is no more affected by it than if it had been in terms the separate covenant of the husband.

It follows that, in our opinion, the deed, with its certificate of the complainant's acknowledgment, &c., is a complete bar to her claim of dower. It would have been so, if she had been merely named as a party, and had signed and acknowledged the deed without having been united in the grant or in any of the covenants. And while we doubt whether the deed as originally drawn could have any other effect than to bar her dower, we are satisfied that she could not have bound herself by the personal covenant, or by the representation as to quantity.

Wherefore, the decree dismissing the bill is affirmed.

B. & A. Monroe for plaintiff; *Herndon* for defendant.

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Morrow *vs* Whitesides' Executor.

CHANCERY.

ERROR TO THE HOPKINS CIRCUIT.

Case 106.

Husband and wife. Slaves. Law. Equity.

JUDGE SIMPSON delivered the opinion of the Court.

September 12.

Case stated.

IN the year 1841 Sarah Winstead, being the owner of a female slave, intermarried with one Samuel Whitesides. Prior to her marriage she had hired out the slave for one year. Before the expiration of the year, her and her husband both died; she, however, having died before her husband.

After the death of the husband and wife, John Morrow claiming to be a creditor of the wife before her marriage, administered on her estate, and took into his possession the aforesaid slave. He returned an inventory of her estate, which contained the slave only, and made a settlement with the County Court, in which he brought the estate in his debt—the assets in his hands being insufficient to discharge his demand against his intestate.

The husband's executor having obtained a judgment against Morrow for the value of the slave in an action at law, the latter brought this suit in chancery for the purpose of subjecting the slave to the payment of his debt, or, if that could not be done, to obtain a decree against the estate of the husband for the amount due to him by the wife previous to her marriage.

This case having occurred previous to the passage of the act of February 1846, further to protect the rights of married women, is not affected by its provisions, but has to be decided by the law as it stood prior to the passage of that statute.

It is contended that as the slave was hired out at the time of the marriage, and the husband died before he obtained the possession of it, his executor has no right to it, that the title to it vested in the administrator of

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MORROW vs WHITESIDES' EXECUTOR.

The right of a husband in the slaves of his wife, which are hired out at the time of the marriage, is not a mere *chose in action*; the title vests absolutely in the husband, and upon the death of the wife even before the expiration of the hiring, the husband is entitled to the slaves: *Banks* vs *Marksberry*, 3 *Litt.*, 283–4; *Turner* v *Davis*, 1 *B. Monroe*, 152.) And in such case the executor of the husband having recovered the slave at law, the administrator of the wife is concluded by such judgment from asserting title in chancery to the slave.

The liability of the husband for the debts of the wife, created before coverture, continues only during the coverture: upon her death his liability ceases—and is the same at law as in equity, according to modern decisions: (*Clancy on the rights of Woman* p. 15.)

the wife, and it is assets in his hands for the payment of his wife's debts.

The right which the wife had to the slave at the time of her marriage, was not a mere *chose in action*. She was the general owner of the property, in which the hirer had merely a special interest. Upon the marriage the title vested in the husband, if not absolutely, at least *sub modo*, so that upon the death of the wife, before the termination of the interest of the bailee on hire, he became entitled to it as survivor: (*Banks* vs *Marksberry*, 3 *Litt.* 283–4; *Turner* vs *Davis*, 1 *B. Mon.* 152.) The executor of the husband, therefore, had a right to the slave. She belonged to the estate of the husband and not that of the wife, and was not liable for the payment of her debts. Besides, the judgment at law concluded this question, it being necessarily involved in the trial of the issue in that case.

The husband's liability for the debts of the wife continued only during the coverture. After her death that liability ceased. It is now contended, however, that the legal liability of the husband alone was terminated by the death of the wife, and that he still remained responsible in equity to the extent of the estate that he had acquired in right of his wife.

It was formerly held, that the husband was chargable in equity, after the death of his wife, for her debts to the extent of her personal fortune he had received with her. This doctrine, however, was afterwards overruled, and it is now well settled, that the rule as to the husband's responsibility is the same in equity that it is at law: (*Clancy on Rights, p.* 15.)

As the husband's estate was not liable for the complainant's demand against the wife, the decree of the Court below, dismissing the complainant's bill, was proper.

Wherefore, the decree is affirmed.

B. & A. Monroe for plaintiff; *J. & W. L. Harlan* for defendant.

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Cross *vs* Petree,

CHANCERY.

ERROR TO THE TODD CIRCUIT.

Case 107.

Trustees and Trusts. Assignee and Assignor.

JUDGE SIMPSON delivered the opinion of the Court—Judge Graham did not sit in this case.

September 13.

A trustee who acts diligently is not in general responsible where he has acted in good faith. Tho' if he have no discretion given he is responsible where he violates the duty imposed. if loss ensue.

A trustee, who in the faithful discharge of his duty, has, in a mere matter of judgment or discretion, fallen into an error that has resulted in an injury to the persons interested in the trust, is not, in the general, responsible for the loss, where he has acted in good faith, and not been guilty of gross negligence.

But there is an obvious distinction between cases where there is no discretion to be exercised, but a plain and positive duty imposed, and those, where such a discretion must from the very nature of the act to be performed exist and be exercised, and where the judgment of the trustee must, upon a survey of the whole matter, determine the line of conduct most advisable for him to pursue.

In the former case he is not required to determine what course is most advisable to adopt, it is his duty to act, and if he fail to do it and loss ensues, he will be liable for it.

The indulgence of a debtor, apparently solvent, may result in the loss of the debt, and yet the trustee failing to use coercive measures for its collection, having acted in good faith, would not be regarded as having been guilty of such negligence as would subject him to liability for the debt lost, because he could not foresee the failure of the debtor, or know that forbearing to sue would jeopardize the safety of the debt.

A trustee to whom a note is assigned in trust, failing to sue to the first term after the note fell

But there is no uncertainty as to the consequences of a failure to bring suit, so far as an assignor is liable for the debt. This responsibility depends upon the exercise of due diligence by the assignee. He is released

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CROSS vs PETREE.

due, whereby the assignor was released, held to be responsible to *cestui que trust*, the debt being lost.

by a failure to bring suit to the first term. A trustee, therefore, in neglecting to sue upon an assigned note, releases the assignor. He knows that such will be the effect of a failure to sue. He thus knowingly lessons the security of the debt, and according to every principle of equity, should be considered as increasing his own responsibility to the same extent. Suppose a trustee should receive into his hands a note for a debt, with good personal security, and he should neglect to sue until the surety was discharged by the operation of time, and the principal should become insolvent, and the debt be lost, would there be any plausibility in the argument that as he had every reason to suppose the principal debtor to be solvent, and had only released the surety by delaying to bring suit and not by any active interference, he was not guilty of gross negligence, and therefore not responsible for the debt? His omission to do that, which he must know will certainly and necessarily diminish the safety of the debt, cannot be considered otherwise than gross negligence. When his neglect to sue has the effect of releasing the assignor or the surety, it amounts to gross negligence and renders him liable for the debt, if the parties released by his negligence are solvent, and would, had they remained liable for the debt, made it good and available.

In this case, the debt was of considerable magnitude upon an individual having but little property, not, indeed, exceeding in value the amount of this debt alone. For this reason it was important that the assignor should be held responsible for the debt.

That the note was given to the assignor *as executor*, where it was assigned to pay a debt for which the assignor was personally liable, can make no difference in his liability as assignor.

It is, however, contended that the assignor was not responsible on his assignment, he having made it in discharge of a demand against him as executor, and, therefore, the failure to sue to the first term of the Court did not affect the safety of the debt. And that if liable at all as assignor, it must be according to the laws of Tennesse, where he resided at the time of the assignment; and as there is no evidence in the record of the nature and extent of this liability, as determined by the laws of that State, the Court cannot decide

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that the assignment imposed upon him any liability whatever.

The assignor, as executor of John Cross, deceased, having in his hands a large estate belonging to the children of the testator, was required by a decree of the Todd Circuit Court to deliver the property and pay the money in his hands to Hazel Petree, the trustee appointed by the Court to manage the estate for the benefit of the children. It appeared by the settlement made with him, as executer, that he had in his hands a large sum of money belonging to the children of his testator, and, by the terms of the decree, he was permitted to pay it to Petree by assigning to him cash notes upon good men in certain specified counties. One of the notes so assigned, Petree has been unable to collect on account of the insolvency of the payor. The question then is, was Cross, as assignor, liable for the debt if suit had been brought upon the note in due time, so as to have fixed his liability as assignor.

There is no evidence that the note was executed to Cross for the trust funds in his hands as executor. It was not payable to him as executor, but was payable to him in his own right. By its transfer to Petree he discharged himself from the payment of its amount in money for which he was liable. He was, it is true, permitted by the decree to pay Petree in good cash notes, but he was required to assign them, or in other words to guarantee in a particular mode the solvency of the makers. We are unable to perceive any ground for the assumption that his assignment imposed no liability upon him, but operated merely to transfer the legal title to the note. He made the assignment in his individual right and not as executor; and although it discharged a demand against him as executor, yet it was a demand for which he was liable out of his own estate, and consequently the assignment was based upon a valuable consideration, and had the same effect that assignments have in ordinary cases.

It is further urged that the assignor resided in the State of Tennessee at the time the assignment was ex-

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CROSS
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The place of making the contract, and of performance gives the law of the contract: (*Story's conflict of Law*, 262.)

ecuted, and his liability upon the assignment must be determined by the laws of that State. It is a sufficient answer to this argument, that there is no evidence in the record of the fact upon which it is predicated. It does not appear where the assignor resided at the time of the assignment, but the assignment was made in this State. If, therefore, Cross resided in the State of Tennessee at that time, his liability as assignor would nevertheless depend upon the laws of the place where the contract was made, it being also the place of its performance, inasmuch as Petree, with whom the contract was made as assignee, resided in this State: (*Story's Conflict of Laws*, 262.)

The debt then which has been lost was, when it passed into the hands of the trustee, secured by the assignment of the payee of the note. It was alledged in an amended bill that the assignor is solvent and good for the amount of the debt, and that the debt was lost by the gross negligence of the assignee in failing to use due diligence in his efforts to collect it. To this amended bill there was no answer. The failure to answer this amended bill, together with other circumstances which appear in the cause, leave no room to doubt the ability of Cross as assignor to pay the debt.

The mode in which the responsibility of the assignor was to be continued and rendered available, was not doubtful or uncertain. The trustee does not allege either that the assignor was not liable, or that he did not know how to proceed to secure that liability, but states that he deemed it unnecessary to use the diligence necessary for that purpose, entertaining no doubt of the solvency of the payor.

A trustee who releases a surety or negligently fails to avail himself of all the means of saving a debt in his hands becomes personally responsible in case of its loss to the *cestui que trust*.

It was the duty of the trustee, however, to manage the debt so as not to surrender or release any security which he had for its payment. When he released the assignor by neglecting to sue the debtor, he in effect gave up a security that the law had placed in his hands, and voluntarily incurred the risk occasioned by the act. He is, therefore, liable for the loss of the debt, and should be required to retain the judgment, and pay

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over the amount to those entitled to it, after deducting a liberal compensation for his trouble as trustee.

Wherefore, the decree is reversed, and cause remanded for a decree in conformity with this opinion.

Grider for plaintiff; *Ewing and Bristow and Petree* for defendant.

Mills and Wife *vs* Wimp.

CASE.

ERROR TO THE MEADE CIRCUIT.

Case 108.

Slander. Words.

JUDGE GRAHAM delivered the opinion of the Court.

September 13.

THIS is an action of slander by the plaintiffs in error against the defendant. The Circuit Court having sustained a demurrer to the declaration, the plaintiffs have brought the case to this Court for revision. The declaration is in the common form, and the only question presented for determination is whether the words charged to have been spoken by the defendant of and concerning the female plaintiff are slanderous in legal contemplation.

The case stated.

The words said to have been spoken by the defendant are these: "She put poison in a barrel of drinking water to poison me." "He had said she had put poison in his barrel of drinking water to kill him, and he would say it again, for she did do it." A spoken communication is not held to be slanderous, in the legal meaning of the word, unless it amount to a charge of having been guilty of a crime or of some misdemeanor, where imprisonment or other corporal punishment is the primary and immediate punishment for the offence, or of having one of certain contageous disorders, or is prejudicial in relation to office, trade, &c., or because being disparaging they have been the cause of specific damage to the party charged: (*Cooke on Defamation*, 7, 8, 12; *Kent's Com.*) We suppose that the misdemeanor alluded to in the text, should not be understood as embracing every misdemeanor, but only to embrace such as imply some heinious offence, involving moral turpi-

"She put poison in a barrel of drinking water to poison me."—"He had said she had put poison in his barrel of drinking water to kill him, and he would say it again for she did do it." Held to be actionable.

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MILLS AND WIFE vs WIMP.

tude. The words charged in this declaration do not impute to the plaintiff an offence deemed felony at common law, and as they were spoken before the passage of a recent act of the Legislature on this subject, whether they are actionable or not, must be tested by the common law. If they charge any indictable offence, it is only that of a misdemeanor. Misdemeanors are defined to be all offences lower than felonies which may be the subject of indictment: (*Wharton's Am. Crim. Law*, 2.) They are divided into two classes: first, such as are *mala in se* or penal at common law, and, second, such as are *mala prohibita* or penal by statute. It is said that at common law whatever mischievously affects the person or property of another, or openly outrages decency or disturbs public order, or is injurious to public morals, is a misdemeanor; and it has been held that to cast the carcass of an animal in a well, in daily use, is a misdemeanor. An act which tends or incites to the commission of any specific offence, or to solicit its commission, if it has a direct and immediate tendency to the commission of the offence, is a misdemeanor: (*Wharton*, 3, 4, 5.) Again: it is held that where an act is done, if it be accompanied with malicious and unlawful intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable: (*Wharton, note l, p.* 5.) Charging another with solicitation to commit a felony is actionable, as imputing a misdemeanor: (2 *East R.* 5, 6.)

Examples of words held to be actionable.

We cite also the following adjudged cases, in which the words charged have been held to be actionable as slanderous: "Talbot and Gough agreed to hire a man to kill me, and that Gough should show me to the hired man to kill me:" (*Cro. Eliz.*, 191; *Cro. Car.*, 140.) "The plaintiff colluded with A and B to make a person swear falsely before a Justice of the Peace in a suit pending before him:" (6 *Binn.* 121.) "He sought to murder me, and I can prove it," because the term *sought* is shown by the latter words to refer to some overt act capable of proof: (3 *Bulstr.* 167.) Other authorities

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might be referred to supporting the foregoing, but these are deemed sufficient to determine the question before us.

If the words "he sought to murder me, and I can prove it," and the case cited from East, be sufficient to maintain an action for slander, because the intent to kill was manifested by some overt act capable of proof, it would seem almost necessarily to follow that the words charged in this declaration ought so to be holden. Here is a direct charge of intention to kill, and that that intention was attempted to be carried into execution by actually putting poison in the defendant's barrel of drinking water. An overt act is charged, which, if truly charged, is susceptible of proof.

The act of putting poison into a barrel of water kept for the purpose of quenching thirst, would be more dangerous to health and life than the animal carcass could be, and could hardly be viewed as an innocent act; but when it is done with the wicked intent and design to take the life of a man, it must be regarded as highly criminal. The moral sense of the community would revolt at it, and he who is so guilty, would be avoided as would be a deliberate murderer. The offence here charged is not only that of saturating water with poison, but of water kept in a barrel for the purpose of being drank by the defendant.

It seems to us, in view of the authorities referred to, and of the degrading imputation cast on the plaintiff, the words charged in the declaration ought to be held to be slanderous, and for the speaking of which an action may be maintained.

We are, therefore, of opinion that the demurrer to the declaration ought to have been overruled, and that the Court erred in not so doing. The judgment of the Circuit Court is, therefore, reversed, and the cause is remanded to that Court with directions to set aside the judgment, and overrule the demurrer, with leave to the defendant to plead, and for other proceedings not inconsistent with this opinion.

J. & W. L. Harlan for plaintiff; *Helm* for defendant.

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MOTION.

Case 109.

Rice *vs* Rice.

ERROR TO THE LOGAN COUNTY COURT.

Division of Lands. Heirs.

September 13. JUDGE GRAHAM delivered the opinion of the Court.

Case stated.

THIS is a writ of error prosecuted by Polly Turner and others, part of the heirs of Jonathan Rice, deceased, against Wesley Rice and others, to procure a reversal of certain orders and proceedings had before the Logan County Court, dividing the lands of said Jonathan Rice, deceased, among his heirs.

Where a proceeding is had for dividing land among heirs before the County Court, the record should show the names of the applicants, & that the decedent died in the county, & that part of the real estate of deceased lies in the county.

Several objections have been taken to the proceedings, some of which are, in our opinion, sufficient to require a reversal. "In summary proceedings of this character it is essentially necessary that the record should show the existence of facts which give the Court a right to exercise jurisdiction of the case:" (3 *L.* 40.) It ought to appear that every requisite of the law had been complied with: (2 *Mar.* 559.) The act of 1811, (2 *Statute Laws*, 1070,) under which we suppose this proceeding was had in the County Court, authorizes the County Court of the county where the intestate may die, or where the estate descended, or any part thereof lies, on the application of the *heirs*, or any of them, of the intestate, to appoint three fit commissioners to make partition of all the real estate, so descended, amongst the said parceners. The commissioners are to be sworn to perform their duty, and if all the heirs do not apply for the order, it must appear by affidavit, produced to the Court, that the applicant has given reasonable notice to every other person interested, &c. The record before us states that the order appointing commissioners was made "on the motion of Jonathan Rice, administrator of Jonathan Rice, deceased, and the heirs of said Rice, deceased, but fails to

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name the persons appearing before them, and representing themselves to be heirs of Jonathan Rice, deceased. The Legislature, in their requisition that the application should be made by the heirs, certainly intended that the record should show by whom the motion was made, so that if it be done by persons claiming to be heirs, but who are not in fact so, the real heirs may be enabled to treat the whole proceeding as a nullity. The application may be made by persons representing themselves as the *only* heirs of the decedent, and the Court may entertain the opinion that there are no others entitled to claim as such, and yet there may be others, unknown to the Court. The order in this particular, therefore, is defective. It ought to have named the persons at whose instance the order was made. Again: it does not any where in the record appear either that said Jonathan Rice died in Logan county, or that any portion of his lands lie in that county. One of these facts must exist, otherwise that Court cannot entertain jurisdiction of the case.

The same order which appointed commissioners to divide, also directed them to convey to the heirs. This was premature. The act requires the commissioners to make report of their proceedings, in the premises, to the Court, and if no exception is sustained to their report, the commissioners shall be empowered by the Court to convey to each parcener. As the order will be sent back, we suggest, without deciding the omission to be fatal, that it is advisable that the fact of the commissioners having been sworn before they proceeded to act, should be verified by the certificate of the Justice of the Peace.

Because of the failure to mention the names of the heirs, at whose instance the order was granted, and because it is not shown either that Jonathan Rice died in Logan county, or that any part of his real estate lies in that county—the order of the County Court and all the subsequent proceedings of said Court, and the commissioners in relation to the division of the real estate of said Rice, deceased, are reversed, and the matter is

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Bird &c. vs Lynn.

remanded back to that Court for new proceedings in conformity with the statute, if the heirs desire a division of the lands descended to them.

Temple for plaintiffs.

TRESPASS.

Case 110.

Bird, &c. *vs* Lynn.

APPEAL FROM THE CALDWELL CIRCUIT.

Trespass.

September 14. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The case stated.

LYNN, an infant, suing by his next friend, brought this action of trespass, assault and battery against Bird, and Jouett and wife, and a joint verdict having been found against them, which the Court refused to set aside, they have appealed from the judgment rendered upon it.

The evidence authorized the jury to find that the plaintiff had been beaten by Bird, and no question is made affecting his case exclusively. There was no evidence directly implicating Jouett in the trespass, but his liability depends on that of his wife—and the only questions made in this Court relate to her liability. There was no proof that she was present at the commission of the trespass, and the jury was not authorized to find, and, as we presume, did not find that she was. But although it is laid down that a married woman cannot be made a trespasser, by reason of her prior or subsequent assent, (1 *Chitty's Pl.* 76,) this must be understood as applicable to her mere assent or acquiescence, and not to her active agency in procuring or inciting the trespass.

The Court instructed the jury, in effect, that if Mrs. Jouett encouraged the trespass, either at the time or before, she was a party to it, and her husband was liable with her. As Mrs. Jouett was not present when the trespass was committed, the word *encourage* seems to be not sufficiently definite to express the true ground

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of liability. If Mrs. Jouett had directed Bird to whip or beat the plaintiff, and he had done it in consequence, this would, undoubtedly, have been an encouragement of the trespass, which would make her a party. If she had said in Bird's presence that the plaintiff was a bad boy and deserved a whipping, or that he had mistreated her, and she wished somebody would whip him, in consequence of which Bird had beaten him, this might, in some sense, have been deemed an encouragement of the trespass, and yet, unless she had used this language for the purpose or with the intention of inciting Bird to commit the act and of thus producing or procuring the trespass, we apprehend that Bird, though in fact committing the act, in consequence of what she had said, should be regarded as a mere volunteer, and that she would not be a co-trespasser on the ground of having encouraged the trespass. To make Mrs. Jouett liable as having encouraged the trespass by words used on a prior occasion, those words must have had a direct relation to the trespass, and have been calculated and intended to produce it by stimulating or exciting some person hearing them to do the act or procure it to be done. If it were sufficient that the act was done in consequence of the words spoken, then one person might be made a trespasser and even a felon against his or her consent, and by the mere rashness or precipitancy or overheated zeal of another, and the mere expression of just anger or resentment, or the statement of a fact calculated to excite indignation against an individual, and to create an opinion or desire that he should be chastised, might make the party using such expressions or making the statement liable for the inconsiderate act of another. Under the operation of such a principle, there would be no safety except in such universal caution and reserve as is neither to be expected nor desired.

To render a party liable for a trespass who was not present, such party must knowingly and intentionally have encouraged its

It appears in this case, that about ten months before the commission of the trespass, when the plaintiff with his father and family were living in the same house with Jouett and wife, the plaintiff and Mrs. Jonett

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BIRD &c. vs LYNN.

commission in a way calculated to cause it to be done.

had a quarrel near a tobacco house, when Mrs. Jouett picked up a tobacco stick and said, if the plaintiff did not quit his *sauce* towards her, she would either whip him or have it done. And on another occasion, a few days before the trespass, as the plaintiff was passing by Jouett's house, Mrs. Jouett said to her husband that she would whip him, (the plaintiff,) and her husband said no, that if he came on the place again *saucing* her, he would do it himself. There is no proof of any other act or word of Mrs. Jouett relating to the subject, and it does not appear that Bird was present on either of the occasions referred to. It seems, however, that he resided at the house of Jouett when the trespass was committed; and he afterwards admitted, to a witness, that he had whipped the plaintiff, and said he did it because plaintiff was in the habit of *saucing* Mrs. Jouett. This statement, however, was not evidence against Jouett and wife; and even if it had been, although it would have shown that the trespass was committed in punishment of an actual or supposed injury to Mrs. Jouett, it would not have authorized the inference that she had intentionally caused or procured it. Nor is there, in our opinion, any ground in the other facts above stated, on which such an inference can be legitimately placed.

If then the instruction be understood as requiring some act or words on the part of Mrs. Jouett, which were intended to produce the trespass, and did in fact produce it, we are of opinion that the verdict was not authorized by the evidence. But applying the instruction to the case actually before the jury, we are inclined to the opinion that it was misleading, and did in fact mislead the jury, by not presenting with sufficient distinctness the idea that to make Jouett and wife liable as trespassers by prior actions or words or encouragment, they must have been such as were calculated to produce the trespass, and used for that purpose, and as did cause it to be committed. They, or one of them, must have knowingly and intentionally encouraged the trespass, or neither was liable. In either view of the instruction a new trial should have been granted.

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Wherefore, the judgment is reversed, and the cause remanded for a new trial.

J. & W. L. Harlan for appellants; *M. Brown* for appellee.

Cornelison *vs* Browning.

CHANCERY.

ERROR TO THE MADISON CIRCUIT.

Case 111.

Wills. Comity. Proof of Foreign Wills.

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JUDGE GRAHAM delivered the opinion of the Court.

September 17.

THIS case is now for the second time before this Court for revision. Its facts are reported in 9 *B. Monroe*, 50. The most important question now presented in the record for decision, is whether the will of James Dinwiddie, deceased, under which Browning claims to derive title to 120 acres, part of the land in contest, ought to have been rejected. When this instrument was admitted to be read as evidence on the first trial of this suit, the only evidence of its probate was the certificate of the Clerk that it had been produced in open Court, proved by one of the subscribing witnesses, and had been duly recorded. It was then determined that this certificate was insufficient, and that "a copy of the proceedings in Court, and the orders made and certified by the Clerk is the only competent testimony of what an existing record contains." When the cause was again heard, the will was reproduced and admitted as evidence. It is dated September 3, 1826, signed by the name of the testator with a seal annexed, and has the names of two persons purporting to be attesting and subscribing witnesses. It was presented for probate to the Henry County Court, in the State of Tennessee, and a copy from the records of that Court, contains the following evidence of probate. After setting out the term of the Court and Justices present, it says: "This day came Moses S. Dinwiddie and produced and exhibited, in open Court, a paper writing purporting to be the last

The case stated, and question presented for decision.

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CORNELISON vs BROWNING.

will and testament of James Dinwiddie, late a resident citizen of Henry county, deceased, and thereupon came Andrew Province, one of the subscribing witnesses thereto, who being first sworn, depose and say that he was personally acquainted with the testator, James Dinwiddie, and that he saw him sign, seal, and heard him declare the same to be his last will and testament, and that he had signed the same in his presence and at his request as a witness, and that he was, at the time of signing the same, of sound and disposing mind and memory, and it was ordered to be so certified and recorded." This paper has been recorded in Tennessee and in this State, without further proof, in the proper office, as a last will and testament.

The only matter in relation to it, necessary to be decided, is whether the proof, as it is exhibited on the record, gives it validity sufficient to pass the title to land lying in this State?

The statute of 1820, (2 *Stat. Law*, 1528) authorized the recording of wills which had been proved and admitted to record in other States, where the testator had last resided, in the Court of Appeals of Kentucky, and made copies of such wills evidence with the same effect as if proved and recorded in this State. The act of 1842 allowed the recording of wills so proved, and to be recorded in the County Court Clerk's offices with like effect.

Before the enactment of the statue of 1820, (2 *Stat. Law*, 1528,) wills admitted to record in other States could not be used as evidence in this State without some proof of their execution in addition to the certificates of proof and registration from the offices of said State. That act provides "that where any last will and testament, containing a devise of land or other estate in this commonwealth, shall have been, or may hereafter be proved and admitted to record by the proper Court of any of the United States, or a foreign country, where the testator last resided, that it shall and may be lawful for any person interested, to cause such will, or a copy thereof, to be recorded in the office of the Clerk of the Court of Appeals of this State;" and "any will or copy thereof, so proved and recorded, shall be evidence in all Courts in this commonwealth, and *have the same effect as if it had been* provedand recorded in the Court of the county where such land or other property shall be." The act of 1842 (3 *Stat. Law*, 585,) permits such foreign wills to be recorded in the Clerk's office of the County Court of the county in which said lands or other property, or part thereof, may lie, and gives it the

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same effect it would have had if it had been recorded in the Clerk's office of the Court of Appeals.

The act of 1797 referred to, and the adjudication on that act referred to: (2 *J. J. Marsh.* 511; 2 *Marsh.* 467; *Litt. sel. cases*, 503.)

The act of 1797, (2 *Stat. Law*, 1537,) concerning wills, enacts that "a will to pass the title to real estate must, if not wholly written by the testator, be attested by two or more competent witnesses, subscribing their names in his or her presence." In the construction of this latter statute, it has been decided that in order to admit a will to record, it is not necessary that *all* the subscribing witnesses should *depose* to its execution, that proof of its due execution by one only is sufficient, provided he does also testify that it was duly attested by the other subscribing witness. It has also been determined that if the probate be made by one only, yet if the record state that the will was *proved* by the oath of one and ordered to be recorded, it must be presumed that he swore to every fact essential to its execution: (2 *J. J. Mar.* 511; 2 *Mar.* 467; *L. S. C.* 503.)

Proof by one subscribing witness of the due execution of the will, and that the other subscribing witness was present and duly attested it is sufficient.

Whether one or more witnesses testify, it must appear, from the proof, that the instrument was in fact attested by at least two witnesses in the presence of the testator. The record from Tennessee is entirely silent on this subject. Although it speaks of Province as one of the subscribing witnesses, yet when it undertakes to recite what he stated on oath, there is no evidence that he proved its attestation by any one besides himself. It is not stated that Province proved the will, but the record purports to recite *verbatim* what he did prove; and in the statement of his proof, as already said, there is no intimation that there was any other attesting witness to the will. If such proof, and such only had been made in a County Court in this State, it is very clear that the will would not be proved so as to pass the title to real estate. It is, however, urged in argument that this will must be taken to have been admitted to record according to the laws of Tennessee, and that the comity between sister States of the Union requires that it should be held as valid here as in Tennessee, and such it is argued is the meaning of the act of 1842. We are not advised of the laws of Tennessee on this

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CORNELISON vs BROWNING.

subject, and perhaps it should be taken for granted that the will, according to the laws of that State, has been duly proved; but admitting such to be the law of that State, we cannot admit the conclusion drawn from the premises.

The States respectively have the power to prescribe the requisites necessary to pass title to the real estate situated therein: (2 *Con. Rep. in notes, page* 438.)

It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which it can pass from one to another, and no title to lands passes by will unless it is executed, proved, and registered, conformably to the laws of the place where the property is situated: (2 *Con. Rep. U. S., in notes*, 438.)

A will admitted to record in Tennessee upon the oath of one subscribing witness, & authentication which purports to certify all that the witness stated in proof of the will, who stated nothing in respect to the presence or attestation of any other subscribing witness, though recorded in Kentucky: Held not to be so proved as to pass title to real estate in Kentucky.

As already shown, the will has not been proved according to the law of this State so as to pass the title to lands, (unless the late acts referred to have that effect,) and the foregoing principles, extracted from Condensed reports, would reject it. We suppose the Legislature did not intend by that act to provide, that if a sister or foreign State by her laws made a *nun cupative* will, or a will attested by only one witness, or the will of an infant, sufficient to convey title to lands in that State, that such will should transfer the title to lands in this State; and yet the argument based on the comity due to another State, and said to be contemplated in that act, would lead at once to such a result. We do not so understand that act. It seems to us that the Legislature only intended to avoid the trouble, inconvenience and expense, and the not unfrequent impracticability of proving in this State a last will which had been made and executed in another, and perhaps distant State, and to remedy that evil, they only intended to say, that if a will in a sister State be proved and admitted to record upon such evidence as the laws of this State require, then a will so proved and recorded shall be evidence in all Courts in this commonwealth, and have the same effect as if it had been so proved and recorded here. It follows that as the will of Dinwiddie was not so proved, it was improperly admitted as evidence, and that for the error of the Court in thus ad-

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mitting it, the decree must be reversed. As this reversal deprives Browning of the offset set up in his cross-bill, the decree dismissing his cross-bill must be affirmed.

This cause is, therefore, on the errors assigned by Cornelison, reversed and the cause remanded to that Court with directions to reject the will of Dinwiddie, as at present proved, and for other proceedings not inconsistent with this opinion. Upon the cross-errors assigned by Browning, the decree is affirmed.

Turner for Cornelison; *Caperton* for Browning.

Hynes, &c. *vs* Stewart & Owens.

CHANCERY.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Case 112.

Partners and Partnerships. Recision of partnership contracts.

JUDGE SIMPSON delivered the opinion of the Court.

September 18.

A. H. HYNES being the owner of a tract of land lying in Butler county, on which there was a large distillery and mill that he had been managing and conducting for at least one year previously, sold, on the 19th day of June, 1848 to Stewart & Owens, of Louisville, one undivided half of the land and the improvements thereon, consisting of a distillery, mill, blacksmith shop, dwelling house, &c., and also the undivided half of a negro man, four flat boats, one complete set of blacksmith's tools, and various other enumerated articles of personal property, together with the grain on hand, and every other thing in use about the establishment, for the sum of seven thousand dollars, payable in instalments. The parties, at the same time, entered into a contract of partnership for the purpose of running and managing the distillery and mill for the term of three years. Hynes was to furnish one half of the means necessary to carry on the business, and was to devote to it so much of his personal attention as its interests required.

At the time this agreement was entered into, Hynes was deeply involved in debt. On the 8th day of Au-

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Hynes &c. vs Stewart & Owens.

gust next following, he conveyed to his father, Thomas Hynes, and Josiah Pillsbury, in trust for the payment of his debts, all his estate of every description, including debts due to him. He had, however, previously transferred to Hynes and Pillsbury a part of the notes executed to him by Stewart & Owens for the purchase money. He immediately afterwards went off, and has not since returned. After the partnership was entered into, he neglected the business of the concern, did not give to it any of his services or attention, and drank to excess until the time he made the assignment of his effects and left the country.

On the 3d day of August, 1848, Stewart & Owens deposited in the Bank of Kentucky, at Louisville, to the credit of the branch of said bank at Bowlinggreen the sum of two hundred and fifty dollars for use of their partner, A. H. Hynes. The branch of the bank at Bowlinggreen was informed by the corresponding Clerk of the mother bank, who made a mistake on the occasion, that the deposit was for one thousand two hundred and fifty dollars, instead of two hundred and fifty only. Hynes, although he had been informed by his partners of the true amount of the deposit, drew from the branch bank the sum of twelve hundred and fifty dollars, a few days before he left the country.

In August 1848, the President, Directors, & Co. of the Bank of Kentucky exhibited a bill against Hynes and Stewart & Owens, setting forth the facts in relation to the deposit, alleging that Hynes had left the State of Kentucky and was a non-resident, and praying for a decree against Stewart & Owens for the one thousand dollars overdrawn.

In the month of September next following, Stewart & Owens filed their answer, which they made a cross-bill against the complainants in the orignal bill, and A. H. Hynes and the persons interested under the deed of trust, made by the latter, and prayed for a rescision of both the contract of purchase and of partnership. They charged in their cross-bill that A. H. Hynes had practiced a fraud on them in concealing from them his true

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condition and utter inability to comply with the terms of the agreement of partnership at the time the contracts were entered into, and in misrepresenting the power and efficiency of the engine which was attached to the distillery, and in falsely representing the engine and machinery to be in good order, the fact being otherwise. That they were compelled to expend a considerable sum of money in making the necessary repairs, and that Hynes had not furnished any of the means required for that purpose, or to carry on the business of the firm. They alleged that had they have known the true situation of Hynes, and the actual condition of the engine and machinery belonging to the distillery, they would not have made the purchase, nor entered into the contract of partnership. They also relied upon other misrepresentations that are not, however, established by the proof, and need not therefore be noticed.

Decree of the Chancellor.

It appeared that during the few months the partnership continued, it sustained a loss of three thousand dollars, the whole of which has been paid by Stewart & Owens. The Court below set aside and vacated the contract of purchase and of partnership, and gave Stewart & Owens a lien on the undivided half of the tract of land, to secure the payment of fifteen hundred dollars, one half of the aforesaid loss. The claimants under the deed of trust, and the assignees of the notes which were executed for the purchase money, have appealed, and Stewart & Owens have assigned cross-errors. The President, Directors & Co., of the Bank of Kentucky did not obtain any relief, and, as they are not parties to this appeal, their claim will not be further noticed.

The contracts of purchase and of partnership were entered into at the same time, and constituted in legal contemplation but one contract. The agreement to carry on the business in partnership for the term of three years, was evidently one of the chief inducements with Stewart & Owens for making the purchase. They resided in the city ef Louisville, at a considerable dis-

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HYNES &c. vs STEWART & OWENS.

tance from the place where the business was to be carried on, and could not give it their personal attention. Hynes who had been previously engaged in the business, as the owner of the property, was relied upon by them for its exclusive and successful management. There is no reason to believe that they would have purchased one half of the property, had there been no agreement with Hynes to conduct the business of the concern in partnership.

Where a contract of partnership is superinduced by the fraud of one of the parties, and a failure to comply with the terms thereof, the Chancellor may rescind the contract of partnership.

Hynes was insolvent at the time the agreement was made. The evidence shows that he was sensible of his true condition, and carefully concealed it from Stewart & Owens. He had not the means to comply with his part of the contract, and was conscious of his inability to do it. His subsequent conduct proves that he contemplated the perpetration of a fraud in the original contract. He transferred, in a very short time after they were executed, the notes for the purchase money that he obtained from his partners. He conveyed, in trust, all the balance of his property for the payment of debts that he owed at the time the partnership was entered into. He was guilty of a gross fraud in taking advantage of the mistake of the bank, as to the amount deposited to his credit, and overdrawing the sum of one thousand dollars, when he knew the true amount of the deposit, and that he was not entitled to the sum drawn. He became more and more dissipated and entirely reckless in his conduct, and in less than two months after the formation of the partnership, absconded and left the country. He misrepresented to his partners, before the agreement was entered into, the true condition of the property, and induced them to give him several thousand dollars more, for one half of it, than its real value. He admitted, after the sale, that he had induced Stewart & Owens to purchase, at so high a price, by their reliance upon his knowledge of machinery and his competency to manage the business successfully, and that he had informed them that their purchase would furnish him with means to comply fully and satisfactorily with his part of the contract; yet, notwith-

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standing that statement to them, he almost immediately thereafter applied their notes to the payment of pre-existing liabilities. Considering all these facts and circumstances, we regard the fraud as fully established, and the decree of the Chancellor rescinding the contract of purchase and of partnership as correct; and as the expenditures of Stewart & Owens were made under the contract, and a part of them for the improvement of the property, they were entitled to an equitable lien upon the property for the payment of the balance due them. As the suit is still pending, the Court below can make any decree that is equitable and proper in relation to the slave embraced by the contract. There is no error, therefore, to the prejudice of the appellants.

Stewart & Owens, by their cross-errors, insist that the whole loss incurred by them, should have been decreed against Hynes, instead of one half only. The partnership has not merely been dissolved, but the agreement itself rescinded, upon the ground of fraud, and, therefore, that they have an equitable right to be indemnified against all loss.

Where a partnership contract is rescinded for fraud in the contract, the Chancellor will do equity to the party who has been seduced into the contract, and secure him against loss, provided creditors of the firm be not prejudiced thereby.

Had a partnership existed and a dissolution been decreed upon the ground of the misconduct of Hynes as partner, the loss would have fallen upon the firm, and Stewart & Owens must have sustained one half of it. But an agreement of partnership may be rescinded where a person has been induced to enter into it by fraudulent representations, and the partnership be declared void: (*Collyer's Law of Partnership*, 199; *Gow on Partnership*, 121.) When the contract is rescinded and the partnership declared void upon the ground of fraud, the injured party, except so far as the interests of the creditors of the firm may be concerned, should not be regarded as a partner, or subjected to any of the loss which may have been sustained by him. He is entitled to redress against the perpetrator of the fraud to the extent of the injury that he may have sustained, unless he should continue the partnership after he became apprized of the commission of the fraud. It seems to us, therefore, that Stewart & Owens are entitled to

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a decree against Hynes for the whole sum expended by them under the contract, being three thousand dollars over their receipts from the same source. The decree, therefore, as rendered, is to their prejudice.

Wherefore, the decree is affirmed upon the original errors, and reversed upon the cross-errors, and cause remanded that a decree may be rendered against Hynes in favor of Stewart & Owens for the sum of three thousand, instead of the sum of fifteen hundred dollars, and their lien upon the property be enforced for its payment.

Fry & Page for plaintiffs; *Speed* for defendants.

TRESPASS. *Case* 113.

Blankenship *vs* Cressillas.

ERROR TO THE WHITLEY CIRCUIT.

Pleading. Assignment of choses in action.

September 19. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Case stated.

THE declaration in this action of trespass commences as follows: "Kennedy Blankenship, (who sues this action for the benefit of William Hays,) plaintiff, complains of James Cresillas, defendant," &c., and goes on to state in clear and concise terms that the defendant, with force and arms took and carried away and converted, &c., a horse, the property of the plaintiff and in his possession. A demurrer to the declaration was, however, sustained, and no amendment having been made, a judgment was rendered against the plaintiff, for the reversal of which he has brought the case to this Court.

The question presented for decision.

The only objection made to the declaration, and the one on which it is said the demurrer was sustained, is that it states that the plaintiff sues for the benefit of another; and it is argued that a cause of action for a trespass or other tort, not being assignable, it would defeat this rule of law and the policy on which it is founded, to allow such an action to be maintained by

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one person for the use of another. The common law did not allow any choses in action to be assigned, and the common law Courts, for a long time, refused to recognize any right or interest in the assignee even of choses in action *ex contractu*. This rigor has, however, been relaxed; and although the assignment of such choses may not vest the legal interest and right of action in the assignee, it is held to invest him with a beneficial interest, which the Courts will protect against the holder of the legal right who must be the plaintiff.

Though many *choses in action* be not assignable there are many transfers of *choses* of a particular description, arising *ex contractu*, which courts of law will notice and protect.

The fact that while choses in action, *ex delicto*, remain unassignable, many choses in action, *ex contractu*, and in this State nearly all such, are made or allowed to be assignable, so as to vest the legal title in the assignee, indicates a distinction in the effect which the general assignability of these different classes of choses in action might have upon the general interest and quiet of the community. And we do not doubt that the Courts are so far bound to a rigid observance of the common law rule, with respect to causes of action, *ex delicto*; and especially to such as arise from forcible injuries, or others for injuries to the rights of persons, as to give no effect what ever to any attempted assignment of them, or to any right claimed by the assignee, whether under an actual assignment or under an agreement in any form, that he shall have the benefit of the action. And even if the existence of such an agreement should be deemed a sufficient ground for defeating the action brought in pursuance of it, we apprehend that the statement in the caption of the declaration, that the plaintiff sues for the benefit of another, should not produce that result. Such a statement gives no right to the alleged usee which he can enforce, or which the Court can regard. It may prove the intention or determination of the plaintiff to make a particular disposition of the fruits of the action. But it does not prove any illegal arrangement, or agreement founded on consideration, by which he has undertaken to sue for the benefit of another, or to let that other sue in his name for his own benefit. It may indicate a merely voluntary

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disposition of the proceeds of the action, or it may have reference to and have grown out of such a relation of the parties (plaintiff and beneficiary) to the property at the time of the trespass, as entitled the usee to the proceeds of the action, as might be the case between bailor and bailee. And, therefore, it cannot be assumed upon demurrer as being sufficient evidence of a sale or illegal agreement for the transfer of the damages to be recovered.

A declaration in trespass in the name of H "who sues for the use and benefit of H," is demurred to, the demurrer presents no such question of the illegality of the assignment, as authorizes the Court to sustain the demurrer to the declaration, and defeat the action. The words "for the benefit of H," are mere surplusage.

B sues in trespass for the benefit of H. The fact, if pleaded, that by contract between H & B, H is to have the proceeds of the suit, does not necessarily defeat the right of recovery, tho' such contract might not be enforcible.

If then a sale or agreement of sale be not only void, but actually illegal, and sufficient if properly presented to defeat the action, we are of opinion that the declaration does not authorize the assumption of such agreement and that it contains no ground for defeating the action. The existence of the supposed illegal agreement, should have been pleaded when its effect upon the action might have been questioned by demurrer, or the allegations of the plea might have been denied or avoided.

We are not, however, to be understood as deciding the question, whether an agreement that a third person should have the proceeds of the suit, would, if properly presented, be fatal to the action. We only decide that that question is not presented in this case by the demurrer to the declaration. We consider the words indicating that the action is brought for the benefit of Hays, as mere surplusage, which might be stricken out without affecting the validity of the declaration or the legal rights of the parties. As they do not prove any illegal agreement, they should, in any view of the law applicable to the transfer of choses in action, have been disregarded on the demurrer. And we are of opinion that an agreement, founded even on a valuable consideration by which a third person is to have the proceeds of an action, *ex delicto*, would not necessarily be illegal, or have the effect of defeating the action, though it might not be enforcible.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the declaration and for further proceedings.

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J. & W. L. Harlan for plaintiff; *Burton and S. Woodson* for defendant.

Hamlet *vs* Bates' Executors.

ASSUMPSIT.

ERROR TO THE CLAY CIRCUIT.

Case 114.

Parties. Joint contracts by parol.

JUDGE SIMPSON delivered the opinion of the Court.

September 19.

THIS was an action of assumpsit against the executors of Daniel Bates, deceased. The first two counts in the declaration set forth a joint contract and undertaking by the defendant's testator and one Morris. The other counts are founded on a promise made by the defendant's testator alone. The Court below sustained a demurrer to the declaration and gave a judgment for the defendant, and the plaintiff has prosecuted a writ of error to reverse the judgment.

Case stated.

In support of the demurrer it is insisted that there was a misjoinder of causes of action, and therefore the declaration is bad. There is, however, no foundation for this objection to the declaration. All the causes of action are based upon the promise of the defendant's testator. The counts are of the same nature, the same pleas are appropriate, and a similar judgment is required upon each. Such promises may, therefore, be joined in the same declaration.

Counts upon promises by a testator and another, and upon promises by the testator alone, may be joined in the same declaration, tho' the surviving promissor be living.

The first two counts in the declaration are objected to upon the ground, that upon the death of Bates the legal obligation devolved exclusively upon Morris the joint contracting party and survivor, and the representatives of Bates are not liable at law.

The case, however, we think, is embraced by the statute of 1797, (1 *Stat. Law*, 318,) which enacts "that the representatives of one jointly bound with another for the payment, &c., and dying in the lifetime of the latter, may be charged, by virtue of such obligation, in the same manner as they might have been charged, if the obligors had been bound jointly and severally."

The statute of 1797, (1 *Stat. Law*, 318,) authorizes suit against the representatives of one jointly bound, though by parol contract, though the surviving obligor be living in

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the same manner as if such obligor had been *jointly and severally* bound.

If parol contracts and undertakings are not within the express letter of the statute, they are evidently embraced by its spirit and meaning; and the same reason which required a change of the common law upon the subject of the legal remedy on joint obligations, technically so termed, where one of the joint obligors died, also required a similar change in joint contracts by parol. And as the language of the statute is sufficiently comprehensive to embrace them, we perceive no reason sufficient to justify the conclusion that the Legislature intended to discriminate between the two classes of cases. We are of opinion, therefore, the statute applies, and that an action of assumpsit may be maintained during the life of the survivor against the representatives of a joint contracting party who has died. We understand the case of *Maxey* vs *Averill's executors*, (2 *B. Mon.* 107,) as favoring this construction of the statute.

But had these counts contained no cause of action against the defendants, it was erroneous to sustain a demurrer to the whole declaration, when some of the other counts were undoubtedly good.

Wherefore, the judgment is reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings.

J. & W. L. Harlan for plaintiff; *Burton* for defendants.

ASSUMPSIT.

Case 115.

Elliott *vs* Gibson.

ERROR TO THE JEFFERSON CIRCUIT.

Slaves. Fugitive Slaves. Rewards. Constitutional law.

September 19. JUDGE GRAHAM delivered the opinion of the Court.

Case stated.

THIS is an action of assumpsit by Gibson to recover of Elliott the sum of $100 for apprehending, in the State of Indiana, a fugitive slave, the property of the defendant, and delivering him to the defendant at

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his residence, in Louisville, in this State. The defendant's demurrer to the declaration was overruled. The jury, on the trial of the issue of non-assumpsit, found for the plaintiff one hundred dollars in damages. A new trial was refused the defendant, who has brought the case to this Court for revision, and assigns for error—

1. Overruling the demurrer.
2. Refusing instructions asked for by defendant.
3. In refusing to grant a new trial.

Where a statute gives a remedy, though debt is most usually brought, yet if the statute prescribe no form of remedy, assumpsit may be bro't: (1 *Chit. Plead.*, 120; *Buller's N. P.* 129.)

The only objection taken to the declaration is, that the action, being founded on a statute, should have been in debt, instead of assumpsit. A statute is in some respects considered a specialty, and debt is frequently, perhaps generally, the remedy prescribed for the recovery of any money due to the plaintiff, under its provisions under contract or quasi contract; but when the statute does not prescribe the remedy, assumpsit may be supported, the plaintiff not being by it restricted to any particular remedy: (1 *Chitty's Pleadings*, 120; *Buller, N. P.* 129.) The declaration is in apt form, and we think the demurrer to it was properly overruled. The Court refused, as we suppose properly, to instruct the jury as in case of a non-suit. The testimony was at least strong enough to require the Court to leave its weight to the consideration of the jury. Eight other instructions were asked by the defendant, and refused by the Court. The 2d, 3d, 4th, 5th and 6th, bring in question, the constitutionality of an act of the Legislature of this State, approved February 8th, 1838, which enacts "that the compensation for apprehending fugitive slaves taken without this Commonwealth, and in a State where slavery is not tolerated by law, shall be one hundred dollars, on the delivery to the owner, at his residence, within the Commonwealth, and seventy-five dollars if lodged in the jail of any county in this Commonwealth, and the owner be notified so as to be able to reclaim the slave." By the 7th, the Court was asked to instruct the jury "that if the slave, after being brought to Louisville, escaped

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from the plaintiff before being delivered by him to the defendant, and the plaintiff abandoned the immediate pursuit of said negro, even though the negro was subsequently arrested by plaintiff and by him delivered to the defendant, they should find for the defendant." The 8th embraces the same idea, with the addition that if the subsequent arrest was by some one else than the plaintiff, no arrangement between plaintiff and that person can so connect the second arrest with the first, as to entitle the plaintiff to recover for the arrest in Indiana. The 9th asked for, told the jury that if after the negroe's escape in Louisville, the plaintiff abandoned the immediate pursuit, and the negro was arrested by Vanseikles, and said last arrest was recognized by plaintiff and defendant as the arrest of Vanseikles, they must find for defendant.

It seems to us that the proof, although somewhat uncertain, was sufficient to authorize the jury to find that the plaintiff had arrested the defendant's runaway slave in Indiana, and that after being by him brought to Louisville the negro escaped.

If a runaway slave from Kentucky be arrested in Indiana, & brought to Kentucky, and escape from the person apprehending, the taker up in Indiana may demand the slave from any person apprehending in Kentucky, and has a right to the reward due for apprehending in Indiana, upon delivering him to the owner in Kentucky.

We think the proof would not justify the inference that the plaintiff had abandoned the pursuit of the fugitive; on the contrary the evidence is pretty clear, that having two other runaways in his charge, he, as soon as he could, and did deliver them to the jailer, immediately commenced searching for the negro in the part of the city in which the slave had eluded his grasp. It seems to us, also, that having as far as he could do, rendered the service, contemplated by the statute, that is arrested a fugitive slave in another State, and brought him to the city in which the owner lived, he had, by these acts, acquired such an interest in the slave as to authorize him, upon the recapture, under the circumstances detailed in this case, and delivery to the owner, to demand the reward to which, by law, he would have been entitled, had the escape from him not have taken place, and that he was as *quasi* owner for the time being, liable to Vanseikles for the reward due to him for apprehending the runaway in Louisville. It seems to

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us, therefore, that the evidence did not authorize the instructions asked for, and numbered 7, 8, 9, and that the Court did not err in refusing them. The main question, however, in this cause is whether the act before mentioned, is in conflict with the constitution of this State. If it be so, the plaintiff would not, as matter of law, be entitled to the sum of one hundred dollars, but only to such reward as the jury might have believed he reasonably deserved to have for the services rendered by him.

If the Legislature has not the power to fix a definite reward for taking up a runaway slave out of this State, we are unable to perceive their authority to have passed any of the numerous laws, to be found in our statutes, upon the subject of runaway slaves, estrays, and other similar subjects. During the existence of the colonial government, in Virginia, as early as 1748, a statute was enacted giving a fixed compensation for taking up a runaway slave, viz, if apprehended under ten miles from his home, a reward of 100 pounds of tobacco, and if over ten miles, then a reward of 200 pounds of tobacco. In the same year a fixed compensation was ordered to be paid to the taker up of stray horses, cattle, sheep, goats, hogs, boats, &c. After Kentucky was organized into a separate State, and before the adoption of the late constitution, the Legislature in 1794 passed, and after the adoption of that instrument, did, from time to time, continue to enact, laws giving rewards to the taker up of estrays. By an act passed 16th January, 1798, a reward, increased by the distance which he might have to travel, was given to the apprehender of a runaway slave upon delivering him to his owner. This act, which was passed, as already stated, before the adoption of the constitution of 1799, remained undisturbed by any Legislative or judicial action, and continued in full force until very recently, when it was found that the compensation fixed by it was insufficient to effect its object. Escapes of slaves continued to increase and but few recaptures were made, because, as was supposed, of the inadequacy of

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the reward allowed by law for such services, and therefore the Legislature in the year 1835, increased the compensation to ten dollars if the fugitive was taken in the State, and to thirty dollars if taken up out of this State. It was soon ascertained that, because of the odium which in the non-slaveholding States was visited upon those of their citizens who engaged in the apprehending of fugitives from other States, it was necessary to offer a greater reward, and such as would probably be sufficient to induce men to consult their own interests, regardless of the public sentiment around them. It cannot well be doubted that to the owners of slaves generally, the act of 1838, already quoted, has operated very beneficially, not only because fugitives are more frequently now than formerly returned to their owners, but because the difficulty of final escape has had some tendency to prevent others from attempting it. While these and such like considerations have a strong tendency to sustain the laws giving compensation in such cases, we do not doubt either the power or absolute duty of the Courts to declare them altogether null and void, if, in their opinion, the organic law of the commonwealth forbids such enactments. "By the constitution of Kentucky the legislative power of this commonwealth, that is, all the legislative power subordinate to the constitution, is vested in the General Assembly, subject to such restrictions as are expressed or necessarily implied in other parts of the constitution, and to such as are imposed by the constitution of the United States." (9 *B. Mon.* 333.) It has in this case been argued that the law under consideration is in conflict with the constution. First, because the right of trial by jury to assess the damages or determine upon the amount of the defendant's indebtedness, is taken away by it. Second, because the statute fixes the amount to be recovered from defendant, thereby making a contract for him, and imposing upon him its terms whether he wills it or not, and thereby depriving him of his property without compensation. Third, because, if the Legislature can make a contract

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The statute of 1838, giving a reward for apprehending runaway slaves is not unconstitutional, & the owner receiving his slave so apprehended, is bound for it.

for an individual and fix his liability at $100, they can as well fix it at $1000, or more.

We do not perceive that these suggestions ought to bring us to the conclusion that the act in question violates, in any particular, the organic law of the State. The constitution secures to every citizen "the ancient mode of trial by jury." This provision does not give the right of a jury trial in all cases, but secures it only in that class of cases where the right to demand a jury existed before the adoption of the constitution. This statute does not deprive a party of the right to have the facts of his case tried by a jury, on the contrary, the facts are to be tried by a jury, and then if the facts give to the plaintiff a just claim to reward for apprehending the fugitive, the law declares what that reward shall be. It is true that the act fixing the compensation does not, in its terms, make the payment of the reward dependant on the fact of the reception of the slave by his owner, and it is a question of very serious import whether the Legislature have not transcended their legitimate powers, if they intended by that act to impose on the owner the necessity of paying the sum fixed, notwithstanding he might much prefer yielding up entirely all claim to the services of his negro rather than pay for his delivery a sum greater, perhaps, than his actual value. That portion of the act which provides that if the fugitive slave shall be lodged in the jail of any county in this commonwealth, and the owner be notified so as to reclaim the slave, he shall pay to the taker up the sum of seventy-five dollars, seems to make it imperative upon him to pay the latter sum, although he may be unwilling to receive back his slave, even without the payment of any reward, and, perhaps, the whole act must, with a proper regard to the force of language, receive that construction. The Legislature no doubt have the power to prohibit any person from turning loose his property, of any kind, so as thereby to create a nuisance injurious to the community, but we suppose that, except for some such cause, they cannot compel any one to receive back to

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his service or use, such as he may choose to abandon, and we should very seriously doubt the constiutionality of this act, so far as it may be rightfully construed to be compulsory on the owner of a slave to pay the reward to the taker up of the runaway, whether he will or not again consent to lay claim to the property. We are not, however, at present, called upon by the facts of this case to decide this delicate question. It is proved that Elliott cheerfully received his slave from Gibson, and professed himself willing to compensate him. No controversy arose as to the amount of compensation until after the slave had been surrendered to the custody of the owner.

The Legislature have power to award interest for failing to pay money due upon contracts.

After the day of payment of a pecuniary obligation has elapsed, the law imposes on the debtor the duty to pay an interest of six per centum per annum, and it is not doubted that the Legislature can increase that rate, from time to time, in reference to future contracts, as they may think expedient to the general good. No man is compelled to borrow money, or incur a demand which will bear interest; but if he does enter into such an obligation, although nothing be said as to interest, he tacitly and impliedly takes upon himself the promise and duty to pay the interest prescribed by the Legislature, although he may deem it exorbitant, and it may be in fact ruinous to him to pay it. The county Surveyor is by law entitled to demand certain fees for making surveys of lands. He who employs the services of this officer, is bound to pay him the legal fees, although no such agreement be made, and although he may thus be compelled to pay more than would have been exacted by a private and equally skilful surveyor.

These cases are not precisely analagous to the one before us, but they tend to illustrate our position, which is this, that although the owner of the fugitive may not be under any obligation of duty to receive him from the hands of the taker up, yet if he does so, he, by the act of reception, enters into a compact to pay the prescribed reward, which has been, perhaps, the sole inducement on the part of the other to take upon himself the

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trouble and responsibilty of apprehending the slave. As soon as the slave has escaped to the opposite shore of the Ohio, he finds himself in a land, where the institution and existence of slavery is not recognized, and unless some one shall aid the owner in his apprehension, he will most probably never be retaken.

It is argued that if the owner desires the recovery of his slave, he should offer such a reward as he may be willing to pay, and the captor should look only to the compensation so offered by the owner. Such an offer would probably be known to very few of the citizens of the State to which the negro may have escaped. Even after the owner may have, at great trouble and expense, posted advertisements through the country, it might be a curious subject of enquiry how long they would probably be permitted to remain to meet the observation of such as would be induced by it to undertake the recapture. On the other hand, the public law of a sister State upon that subject may become a topic of conversation, and very readily known to all. One person having apprehended a runaway, and obtained the $100, his neighbors soon learn that he received that sum by reason of a *law* of Kentucky requiring the owner to pay it; and thus a few instances will soon diffuse the information through a whole community, and the people reposing confidence in the good faith of Kentucky, will apprehend the runaway and restore him to his owner, when, under other and different circumstances, he might be permitted to escape.

It is argued, also, that some future Legislature may, by the requisition of extravagant rewards, impose on the slave owner burdens grievious to be borne. That may be true, not only as to compensation for the apprehension of runaways, but as to other subjects connected with the institution of slavery. Should such events occur, it will then be time enough for the Courts to entertain the question whether a flagrant abuse of their powers avoids their act. Such a question, we think, is not presented in this case.

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CLARK'S HEIRS vs FARROW &c.

Although this act may, in some rare instances, operate injuriously, yet its general effect is no doubt to the benefit of the people of this commonwealth.

It has been urged in argument that the effect of the act is to take from one man his property and give it to another. We do not so regard it. Its sole object and effect is to restore property already lost.

We do not perceive that the act in question is either a violation of any provision or principle of the constitution, or that it is so palpably and flagrantly unjust as to justify the judicial tribunals in refusing to enforce it.

Not perceiving any error in the action of the Circuit Court, the judgment is, therefore, affirmed.

Russeau & Elliott for plaintiff; *Guthrie & Tyler* for defendant.

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CHANCERY.

Case 116.

Clark's Heirs *vs* Farrow, &c.

ERROR TO THE McCRACKEN CIRCUIT.

Bills of Review. Parties. Pendente lite Purchasers.

September 20. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The case stated. IN October 1842 William Farrow obtained a decree against the heirs of William Clark, which was made final in April 1843, for the specific performance of a contract for the sale of a lot in Paducah by Clark to Farrow, on the payment of a designated balance of the purchase money then unpaid. In July and August 1843, the balance of the money having been paid to the commissioner appointed to make the conveyance, was by him paid to and received by the agent or attorney of Clark's heirs, who were non-residents of this State; and on the 10th day of August, 1843, the commissioner made the conveyance, which was reported to the Court in October following, and then approved. In January 1843 Farrow conveyed the lot to Joseph Wright, the father of his wife, for an alleged debt of $2000, recited as being the balance of a debt of $6000,

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formerly due between the same parties, and for which Farrow had mortgaged the lot to Wright in 1837, but the mortgage had been released in July 1839, ten days after the filing of Farrow's bill against Clark's heirs, and more than three years before the first decree. On the 2d day of Agust, 1843, Wright, by his attorney, acting under a power containing specific directions, and dated in February 1843, conveyed the lot to Mrs. Eliza Farrow, the daughter of Wright and wife of the complainant Farrow. This conveyance was made to the separate use of Mrs. Farrow, &c., and in consideration of natural love and affection. This deed acknowledged the subjection of the lot for the security of two small sums due from Farrow, to which it had been made subject by his deed to Wright.

In January 1845 a writ of error was prosecuted by Clark's heirs for the reversal of the decree for specific execution, and by the opinion and mandate of this Court, which was entered of record in the Circuit Court in September 1845, that decree was reversed, and the opinion expressed that as Clark's heirs asked for a rescision on the same grounds on which a specific execution was refused, the contract should be rescinded on equitable terms, &c., in regard to which it was said the value of improvements, &c., should be ascertained. After the cause was re-docketed in the Circuit Court, Eliza Farrow filed her petition praying that she and her father, Joseph Wright, might be made parties to her husbaud's bill, which, upon the order of the Court, was accordingly done; and she filed her answer setting forth, as she had done in her petition, the facts nearly as they have been already stated, and making it a cross-bill against Clark's heirs, prayed in effect that her title might be confirmed on the ground that her father was a purchaser for a valuable consideration after the decree, and without notice of the equity of Clark's heirs, to have a rescision of the original contract, or of their intention to prosecute a writ of error to the decree, and which, as she contends, they were equitably estopped from prosecuting by having received through

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Clark's Heirs vs Farrow &c.

their agent a part of the purchase money under the decree.

Clark's heirs, who had answered the original bill, opposed the filing and the prayer of the petition, and afterwards moved to reject it and the answer and cross-bill, to which, however, they never appeared, but rested upon the traverse put in for them as non-residents. The Court, without further proof than is furnished by the exhibits above referred to, decreed that Clark's heirs be perpetually enjoined from asserting any claim to the lot in question, and that Eliza Farrow be quieted in the enjoyment of her title and possession, and that Clark's representatives have the benefit of their remedy at law upon the contract against William Farrow, &c.

The mandate of this Court reversed the former decree, and remanded the cause for further proceedings, and decree in conformity with the opinion then rendered; a part of which was that there was ground for a rescision as prayed for by the defendants, and that the contract should be rescinded. The further proceedings were directed, not for ascertaining the right to a rescision which was decided, but for ascertaining the equitable terms which were to accompany it. From the statement of facts already made, it is manifest that all proper parties were before the Court when the reversed decree was rendered; and all parties to the decree were before this Court upon the writ of error, and were bound by the mandate by which the decree for specific execution of the contract was actually annulled and a decree for a rescision directed. It is certain that if the complainant Farrow had retained his interest, as the only party claiming the benefit of the contract, the decision and mandate of this Court must have been conclusive upon his rights, unless he had set up some new intervening equity against Clark's heirs, or some new matter affecting the original case, which was not and could not have been presented in the prior litigation. By the reversal of the decree, the commissioner's deed made under it would have been, *ipso facto*, an-

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nulled, and would have become wholly inoperative, and in the absence of some new ground of litigation the contract must have been rescinded.

A purchaser from a successful party in chancery is not a necessary party to a bill of review: (*Debell* vs *Foxworthy's heirs*, 9 *B. Monroe*, 228,) and is bound by the decision upon such bill, or upon writ of error.

Could any person, deriving an interest from Farrow, after the rendition of the reversed decree, and before the emanation of the writ of error, occupy a better condition than his? In the case of *Debell* vs *Foxworthy's heirs*, (9 *B. Mon.* 228,) this Court decided that the purchaser from the successful party, after a final decree, was not a necessary party to a bill of review afterwards brought by the unsuccessful party, and was bound by the decree of reversal upon the bill of review, though not a party to that bill. And the opinion (page 233) contains the following language, which seems to furnish a direct answer in the negative to the question just stated. The Court there said: "So far as a voluntary purchaser is concerned, the litigation is regarded as still continuing, notwithstanding the final decree in the Court of original jurisdiction, where a writ of error is subsequently prosecuted, or where a bill of review is filed to correct errors apparent in the record; and he is concluded by the decree which may be finally rendered, founded merely on the same matter originally in issue between the parties." A reference to the opinion will show that this position is stated in relation to a person not a party to the original suit, who becomes interested in the subject after the decree, and that it expresses the ground on which the case was decided. We refer to that opinion for the reasons and authority on which the position rests. And we barely remark in addition, that a title passed by commissioner's deed under a decree for specific performance and other similar cases, stands upon a different ground from that of a title derived under a decree of sale, and an actual sale; because, in the former case, the conveyance of title rests wholly on the decree, and is the same as if it existed in the decree alone, there being no meritorious act done under the authority of the decree which might give additional efficacy to the conveyance.

But in other cases, as of a sale under a decree, the

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CLARK'S HEIRS vs FARROW &c.

A sale made under a decree, which is sanctioned by the Court, is generally effectual to pass title to the purchaser, tho' the purchase be by the successful party, notwithstanding the decree be afterwards reversed: not so when the purchase is from the successful party.

purchase is itself a meritorious act, authorized by the decree and creating an equity; and it is a matter of interest to all parties, and to the public, that such sales, if fairly made, should be sustained, and they are sustained, though such decree be afterwards reversed. They are sustained, too, though the purchaser be the successful party to the suit, because he does not get the land by the direct operation of the decree itself, but by proceedings which it authorizes; and for this reason he is not compelled, upon a reversal, to restore the land, but to restore the price or money which it brought, and which alone he gets by the direct operation of the decree. On these, and perhaps other grounds, may be placed the distinction which has been uniformly held between the effect of reversing decrees for sale, or under which sales have properly taken place, and decrees for conveyance of title where that is the object of the suit, and the very thing decreed.

That tribunals and remedies have been provided for the revision and reversal of decrees, shows that it is not a matter of public interest to sustain erroneous decrees, but the contrary. And the law effectuates, as far as can be justly done, the just principle that what a man has lost by an erroneous decree, shall be restored to him on its reversal. But other principles and an enlarged view of all interests involved, have limited the operation of this principle to the direct loss of one and the direct gain of the other, by the direct operation of the decree. If this loss has been in money, the money is restored; if in land, or the title to it, the land or title is restored or regained. It is by reason of the permanency and identity of this latter subject, that third persons may become involved in the consequences of this right to restitution, in case of the reversal of decrees for title, in a manner which could scarcely occur with respect to decrees for money. But it must be known to all, that decrees are subject to reversal, and, therefore, that a title resting exclusively on a decree, and identified with it, may be divested by its reversal, and, therefore, is not indefeasible until there has been an affirm-

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ance, or until the remedy for reversal is barred. The Legislature by limiting the time within which the remedy for reversal must be sought, has limited the period of this uncertainty in titles; and however inconvenient such an uncertainty may be, a writ of error prosecuted at any time within the prescribed period, is entitled to its full effect. If a title conveyed by a decree is purchased in actual ignorance that there is a remedy for reversal open to the unsuccessful party, and the decree is afterwards reversed, the principle decided in *Debell* vs *Foxworthy* and other cases, by which the reversal of the decree would defeat the intermediate purchase, would doubtless in many cases produce great hardship. But a writ of error upon a decree for title would be of little avail, if the title could be placed out of the reach of the party or the Court by a private sale immediately after the decree. And it can only have its full effect by regarding the intermediate purchaser, as being according to the principle of the case of *Debell* vs *Foxworthy*, either a privy to the decree, or a *pendente lite* purchaser.

But in the case now before us there is less difficulty in holding Mrs. Farrow subject to the effect of the reversal and mandate of this Court, because she is herself a volunteer and not a purchaser for value; and because her father, who received the conveyance from Farrow, is not only not proved otherwise than by the recitals of the deed and his own statements to have been a creditor of Farrow, but appears in fact to have received the conveyance from him before the final decree was rendered, while the suit was actually pending in Court, and before the receipt of the balance of the purchase money by the agent of Clark's heirs, which is relied on as an estoppel. And even Mrs. Farrow received the conveyance to her before the commissioner's deed was made, and before the entire balance of the purchase was paid. With regard to the receipt of the purchase money by the agent, under the provisions of the decree, we do not consider it as in any manner affecting the right of his principals to prosecute a writ

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Botts, &c. vs Patton, &c.

of error with full effect, or as estopping them from claiming the full benefit of the result. And as Mrs. Farrow has shown no equity against them which was not involved in the origiual suit, we are of opinion that her interest is bound by the decree and mandate of this Court formerly rendered, and that the same should have been and must now be carried into full effect.

Wherefore, the decree is reversed, and the cause remanded with directions to dismiss Mrs. Farrow's cross-bill with costs, and to decree a rescision of the contract between Farrow and Clark's heirs set up in the original bill; and the Circuit Court is also directed to ascertain the value of improvements, &c., as directed in the former opinion and mandate, and determine the claims incident to the recision on equitable principles.

J. & W. L. Harlan for appellants; *Husbands* for appellees.

Chancery.

Case 117.

Botts, &c. *vs* Patton, &c.

Error to the Fleming Circuit.

Frauds. Bankrupts. Limitation.

September 21. Judge Simpson delivered the opinion of the Court.

The case stated. Botts and Hathaway each exhibited a bill in chancery to subject to the payment of debts due to them by judgments against John L. Patton, upon which executions had been returned no property found, the estate of the defendant in the judgment, which they alleged, had been fraudulently transferred by him to John McCorkle, and was held by the latter for his use and benefit, to prevent creditors from subjecting it to the payment of their debts.

Patton and McCorkle both denied all fraud in the transaction; and as an additional ground of defence, relied upon the fact that Patton, since the complainant's debts were created, had obtained a certificate of discharge as a bankrupt, and that all his estate had vested in his assignee, who (the complainants being required by the

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Court to make him a party) was made a defendant in both cases. They also relied upon the two years limitation created by the act of Congress in relation to bankruptcy. The two suits were consolidated and tried together, and the decree rendered against the complainants dismissing their bills.

It appears that McCorkle had, a short time before the failure of Patton, obtained from him, by asssignment, two notes for one thousand dollars each, and also a bill of sale for a small negro boy. The fairness of the transaction as to one of the notes, seems to be established by the testimony of several witnesses, but as it regards the other note and the slave, the consideration is proved alone by Patton the debtor. His testimony was excepted to, but it was clearly competent. We do not, however, deem it sufficient to sustain the fairness of the transaction, as to the second note, in opposition to facts and circumstances appearing in the cause, that stamp upon it the mark of fraud and collusion.

In a suit that had been previously brought and dismissed by Botts, in which the complainant had alleged that McCorkle had obtained from Patton, by a fraudulent arrangement between them, an assignment of a note for one thousand dollars, McCorkle was called upon to state what property or debts he had received from Patton, and to detail in full the transactions between them. In responding to that call both Patton and McCorkle denied that the latter had received from the former, either in notes or property, any thing except the note for one thousand dollars, when, in fact, the other note for one thousand dollars had been assigned, and the negro boy sold, by Patton to McCorkle, previous to that time.

McCorkle, in the answer he filed in these suits, attempts to account for and explain the misstatement contained in his answer in his first suit. But the explanation that he gives, instead of being satisfactory, rather proves that he intended his answer to be evasive. If he had added what he says was omitted, viz,

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Botts, &c. vs Patton, &c.

that he had not received any thing from Patton since the commencement of Botts' suit, the answer would not have been responsive to the amended bill, which contained no charge that he had received property during the pendency of the suit, but required him to state how much money he had received from Patton, and how much in property notes and accounts, without any reference to the time of its reception, but evidently referring to the time of Patton's failure, which had occurred before the suit was brought.

McCorkle's means were very limited. He admits in his answer filed in Botts' first suit, that he was worth only about eight hundred dollars. He undertook the settlement of about that amount for Patton in consideration of the transfer of the note for one thousand dollars mentioned in that suit, and as Patton was indebted to him in the sum of two hundred dollars, or thereabouts, he had a motive in affecting the security of the debt due to himself, to take an assignment of that note and assume the payment of the other debts, for part of which he was then liable as surety. But we are not able to perceive any motive to induce him to undertake the payment of Patton's debts, for which he was not liable, to the amount of one thousand dollars more, and in consideration thereof to take a transfer of a debt due at a subsequent period, that he appears not to have been able to collect for several years afterwards. Besides, being worth, according to his own statement, only about eight hundred dollars, the whole of that was absorbed in the purchase of a negro boy, and the payment he made for the tract of land he purchased, so that he had no means left to apply to the payment of Patton's debts.

A consideration of these circumstances has induced the conclusion that the transfer of the other note for one thousand dollars was fraudulent. The evident attempt to conceal the transfer of that note, and the fact that Patton and McCorkle have continued to live together ever since, tend to fortify that conclusion. As Patton proves that the negro boy was sold to McCorkle

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in payment of a debt he owed him, the sale must be regarded as valid.

The question, however, as to the effect of Patton's bankruptcy, and the limitation relied upon has to be disposed of.

A discharged bankrupt is no longer liable for judgment at law, which might have been proved against his estate, nor is any property or right in the hands of a fraudulent grantee liable in equity.

As the debtor was a discharged bankrupt, and no longer liable for the judgments at law, the creditors could not subject any of his estate to the payment of the debts. If he be not liable for the debts, McCorkle cannot be required to pay them by the creditors out of the estate in his hands, for that can be reached alone to satisfy Patton's debts. As, therefore, the latter is discharged from the debts, and no longer liable for them, the creditors cannot proceed against his fraudulent transferee to obtain payment from him.

That a bankrupt before his discharge had made a fraudulent conveyance, will not authorize the Chancellor to set aside the discharge, or to disregard it. Its validity can only be tested by an issue upon specific grounds stated, of unfairness or fraud in its obtention.

It is argued, however, that the bankrupt's certificate of discharge, cannot have the effect here given to it, because of the fraud committed in this transaction. By the express provisions of the act of Congress, the discharge of the bankrupt is to have the effect of releasing him from all his debts, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of property, contrary to the provisions of that act. To avoid, therefore, the effect of a certificate of discharge, when plead and relied upon, as in this case, it must be impeached for fraud in obtaining it, and the grounds of its impeachment properly specified and alleged, which was not done.

It is also contended that the cause was prematurely heard, on the same day the plea was filed, in consequence of which, the complainant had no opportunity to file a replication, or an amended bill, in impeaching the discharge for fraud. The plea was filed on the day previous to that on which the cause was heard, and no objection having been made to a trial at that time, or any proposition made to file a replication to the plea, or for time for that purpose, there does not seem to be any valid ground for this objection.

It is not necessary at this time to decide the effect of the statute of limitations on the right of the assignee

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WRIGHT vs TODD'S HEIRS.

An assignor in bankruptcy, tho' a party to a suit in chancery between the creditors and the bunkrupt is not barred of his right as assignor where he does not assert it, and it is not adjudicated upon.

A bill to set aside a decree for frauds, and is not properly a bill of review, & no writ of error lies to the opinion of the Court refusing leave to file it as such.

in bankruptcy to this estate in the hands of McCorkle, or to determine whether or not the right to it vested in him. Although a party to the suit, he filed no cross-bill, nor asserted any claim to it against McCorkle; the event, therefore, could not enter a decree in his favor, nor does the decree, in the present suit, prevent him from prosecuting a suit hereafter in his own name as assignee, if he should think proper to do so.

At the term subsequent to that at which the final decree was rendered, the complainants offered to file a bill of review impeaching the decree upon the ground of fraud. The Court overruled the motion, and the action of the Court upon that subject, as well as the proceedings and decree in the consolidated suits, are questioned in the assignment of errors.

The bill offered to be filed, was not properly a bill of review, and, therefore, there was no error in the Court in refusing the complainants leave to file it as such. As an original bill, impeaching the decree for fraud, they have a right to file it, and prosecute the suit without leave of the Court, and, therefore, they are not prejudiced by the refusal of the Court to allow them to file it, as a bill of review.

Wherefore, the decree is affirmed.

Boyd for plaintiffs; *Cord* for defendants.

CHANCERY.

Case 118.

Wright *vs* Todd's Heirs.

APPEAL FROM THE LIVINGSTON CIRCUIT.

Vendor and Vendee. Recission.

HENRY WRIGHT, in 1837, purchased by executory contract of William J. Todd a tract of 1366⅔ acres of land lying in Hickman county, on the Mississippi river, at the price of $7,333, payable $5,000 on the 1st of April, 1838, and the balance in equal annual instalments, the last falling due 1st of April, 1842. The three first notes falling due were assigned to one Johnson

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Swayne, and were nearly paid off. In July, 1838, Wm. J. Todd conveyed the land to Wright, and in March 1840 Lucy P. Todd, widow and devisee of Thomas Todd, former owner of the land, also conveyed to Wright, both of which deeds were accepted by Wright.

In April, 1841, Wright filed his bill in the Hickman Circuit Court alleging, substantially, the foregoing facts, and the additional facts that Joshua Swayne held the remaining notes due for the land, but that Wm. Johnson Todd, or his personal representative, was entitled to the money due thereon; that Swayne was moreover indebted to Todd largely; that Todd had left the State of Kentucky and gone to Virginia, and had died in the latter part of the year 1839; that no administration had been taken upon his estate so far as he knew; and charging that in the sale of the land, Todd had defrauded him by falsely representing that certain portions of the land purchased, amounting to several hundred acres were not subject to be overflowed by the highest floods in the Mississippi, when in fact the whole or nearly the whole tract was subject to inundation, and had been in 1828 and in 1840 almost entirely submerged, &c. By this bill no recission was demanded, but only damages to the extent of $1500, sought to be enjoined in the hands of Swayne, who with Lucy P. Todd, the mother, and James M. Todd, the brother, and Dolly M. Todd, the sister, of said Wm. J. Todd, were made defendants. This suit progressed to a decree dismissing the bill, which was affirmed in all material points by the Court of Appeals.

In April, 1845, shortly before the first suit was decided in the Court of Appeals, and near eight years after the date of the contract, Wright filed the present bill for a recission of the contract against the administrator and heirs at law of Wm. J. Todd, and Swayne, the assignee of the unpaid notes, given for the price of the land, in which he incorporated the former suit and its proceedings, and upon allegations of fraud on the part of Wm. J. Todd, substantially the same, but more circumstantially stated; and upon the additional alle-

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gation, made in an amended bill, that the milk sick, as it is termed, prevailed upon the land, prayed for a recission. Several amended bills were filed incorporating other matters not material to be noticed. The Circuit Court, after the case had been properly prepared, in May 1849, by its decree dissolvod the injunction and dismissed the bill, from which decree Wright appealed, and has brought the case to this Court for revision.

REPORTER.

September 18. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

IT can scarcely be doubted that the complainant Wright had, before his purchase, heard of the fact, notorious in the west, that the bottoms on the Mississippi river were subject to occasional, and to more or less extensive and frequent overflows from the floods in that river. And he must have known that no man could tell how often these overflows might occur in future, nor to what extent they would flood the low lands adjacent to the bank of the river. That in the year 1828 the river had overflowed the whole of the bottom land now in question, and that in subsequent years, prior to Wright's purchase in 1837, it had overflowed very nearly the whole, seems to have been well known to those who lived or were conversant in the neighborhood at those periods. And it appears, and indeed is a matter of general knowledge, that these overflows leave marks upon trees and other permanent objects, denoting the water line, and which may be traced by proper scrutiny.

It is not to be presumed that an ordinarily prudent man will make a large investment in the purchase of land in the woods upon a large water course, without using reasonable diligence in ascertaining its liability to overflow. It is his

It certainly could not be presumed that any man of ordinary prudence, about to expend seventeen or eighteen thousand dollars in the purchase of a large tract of land, on the river, almost entirely covered by woods, designing to cultivate the land and make a stock farm, and having his attention particularly fixed upon its liability to be flooded, and upon the consequences of such a fact, would have neglected the means of knowledge and of judgment to which we have adverted, and have rested solely or principally upon the assertions or opin-

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ions of the vendor, a young man, who had but recently settled in the vicinity, who had not witnessed the greater floods of the river, who might have been expected to give the best account of the land which he could, and who was, moreover, subject to such habits of excessive drinking, as must have been obvious to any one in his company for even a few hours, and must have impaired the confidence of any prudent man in his judgment and assurances, and especially as to the future.

duty to use reasonable diligence to ascertain such fact.

There is no evidence to satisfy us that Wright did not avail himself of the accessible means of information, with respect to the liability of the land to overflow, or that he was in fact deceived into the purchase by the representations of Todd on the subject. His long delay in filing the present bill for a recission of the contract on the ground of fraud, and even in filing a prior bill claiming damages, when, if deceived in making the purchase, he must soon have had an opportunity, when he moved upon the land, of discovering the fraud, tend to corroborate the conclusion drawn from the general considerations above mentioned, which is, moreover strengthened by the attitude assumed in another suit, in which he was enjoining on a different ground, a part of the purchase money, and so far from claiming a recission, or even alleging the fraud, he professed a willingness to keep the land and pay for it, if certain objections to the title should be removed, which was done. And it was not until April 1845, nearly a year after the injunction suit had been decided against him in the Circuit Court, and shortly before the decree was, as to its principle features, affirmed in this Court, that this bill for a recission was filed, which, although it relies upon substantially the same facts which had been set up in the bill for damages filed in 1841, seems to claim for them much greater magnitude and consequence than in the bill of 1841, in which the utmost claim for the alleged fraud was $1500.

A purchaser of land will be presumed to have exercised all accessible means and reasonable diligence to be informed of the qualities & properties of the land.

The impression produced by these circumstances is not done away by the evidence of the witnesses. In

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A delay of 7 or 8 years, after taking possession of land purchased before filing bill for recission, of the contract, is a strong circumstance against the claim to recission for alleged fraud in the quantity of the land.

the first place, the two persons who know most about the actual negotiation and representations, differ widely in their statements on the subject; and a third, who was present a part of the time, heard nothing on the subject of the overflows. It is true, several witnesses detail declarations of Todd, made after the sale, to the effect that he had misrepresented the quantity of land free from overflow, and had made an unfair exhibition of it in going over it. But besides the fact that these declarations do not appear to have been made before the assignment of the notes, and to be proper evidence against the assignees of the notes for the purchase, we are of opinion that, considering the nature of these alleged declarations, the circumstances under which they are said to have been made, and the condition of Todd, who seems to have been all the time half drunk, they are entitled to little weight. A man in his senses, who has committed a gross fraud in an important transaction would hardly make proclamation of it immediately after, and in the close vicinity of the defrauded party. Some of these declarations were in public, and repeated in the form of narration, evidently to amuse the bystanders, and all may be regarded rather as the idle boasting of a half intoxicated man, who had made an advantageous sale, than as serious statements of facts. With regard to the alleged deception in riding over certain portions of the land to exhibit it, the fact that Wright never discovered it himself, notwithstanding his subsequent long residence on the land, and presumed familiarity with it, shews that there was no serious deception or artifice, and that the story was a mere exaggeration to raise a laugh.

Upon the whole, we are of opinion that the complainant has made out no sufficient ground for recission, either on the ground of misrepresentation as to the overflows, or on the ground of the milk-sickness, the particulars of which latter subject we have not deemed it necessary to state.

Wherefore, the decree is affirmed.

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Brown and B. & A. Monroe for plaintiff; *J. & W. L. Harlan* for defendants.

Commonwealth for Shelton *vs* Hughes, &c. Same for Hooper's Ex'r. *vs* Same. Same for Sugg *vs* Same. Same for Albert *vs* Same.

DEBT.

WRITS OF ERROR TO THE UNION CIRCUIT.

Case 119.

Constables. Sureties.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

September 23.

Cases stated.

THESE were four separate actions upon the Constable's bond of Dickey, and his sureties, brought in the name of the Commonwealth for the use respectively of the above named persons as relators, and against Hughes and others, the sureties in the bond, the principal being dead. Demurrers to the original declarations, and to the amended declarations, where such were filed, having been sustained, and judgments thereon rendered for the defendants, the plaintiff prosecutes a writ of error in each case, and the four have been heard together.

It is a sufficient averment against a constable and his sureties in a suit on his official bond to aver that an execution was issued by a Justice of the Peace of the county on a judgment rendered by him, and that while in full force it was put into the hands of the constable, received by him and collected by him at a period in the two years, whilst his bond was in full force.

Each of the declarations assigns for breach, the failure to pay over money collected on execution by the deceased Constable, and it is contended that this breach is in every instance defectively stated for the want of a specific averment that the execution was *directed* to the deceased Constable, or to any Constable of the county of Union, in which he was an officer. But as it is alleged in each instance that the execution was issued by a Justice of the Peace of Union county, on a judgment rendered by him, and that while it was in full force it was delivered to Dickey, and received by him for collection as Constable, and was by him collected as Constable, the dates shewing that it was within the two years covered by the bond sued on, we think it is necessarily implied that the executions were in fact di-

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SHELTON, &c. vs HUGHES.

rected to a Constable of Union county, and that the want of an explicit averment of the fact should, therefore, not be deemed a fatal defect in the declarations. As a fact necessarily implied in the allegations made, may be traversed as if it had been expressly stated, so it may be regarded on general demurrer as included in the allegation made. The same observations and the same conclusion apply to the breach alleged in taking an insufficient replevin bond on an execution. The averments with regard to the issuing and delivery of this execution, are the same as above stated, and therefore necessarily imply and include the fact that it was *directed* to a Constable of the county.

That a demand is not averred to have been made of the money collected by a constable on execution, is no objection to a declaration on his bond for failing to pay money collected on execution, if the state of case existed requiring such demand the defendant must show it.

The objection that a special demand of the money collected on the executions is not averred in any of the declarations, and that some of them do not aver that the relator resided in the county so as to show that such demand was not necessary, is fully met and decided to be unavailable in the case of *Wells* vs *The Commonwealth:* (8 *B. Mon.*, 459.) It is there expressly decided that it is not necessary to aver either a special demand, or the residence of the relator, or his agent in the county, but that as matter of excuse the Constable may plead the fact of non-residence, &c.

Constable and sureties are liable for failing to pay over money collected by the constable on notes put into his hands for collection in the same way as for monies collected on executions.

The allegations relating to the failure to pay over money collected on a promissory note, show with certainty that the note was received by Dickey as Constable, at a date within the two years covered by the bond—and although it is not explicitly stated that he collected the amount due on it within the same two years, this fact, if it should be deemed essential to the sufficiency of the breach, is shown with sufficient certainty by the averment that on the day of , 1844, (the bond being dated in May, 1842,) the said Dickey did, as Constable of said county, and while acting as such, under the said writing, obligatory and condition aforesaid, collect and receive the full amount, &c. This breach is deemed sufficient.

The objection taken in one of the cases, that it appears from the condition of the bond that Dickey was

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Constables may perform duties in any part of the counties in which they are appointed, and are not confined to particular districts.

Constable in the — district of Union county, and that no breach is shewn in that district, is untenable. Although since the act of 1820, (*Stat. Law*, 421) Constables are to be appointed within the districts therein directed to be laid off in the several counties, this is a limitation upon the County Courts in the selection of the officer, and is not a limitation upon his powers when appointed; or, if it be impliedly so, the implication is removed by the thirteenth section of the same act, which expressly provides that the several Constables shall have authority to levy executions and attachments, and to serve warrants and other process any where within the limits of the county.

Wherefore, each of the declarations being, in our opinion, substantially sufficient as to each of the breaches alleged, the Court erred in sustaining each of the special demurrers. And in each case the judgment is reversed, and the cause remanded, with directions to overrule the said demurrers, and for further proceedings consistent with this opinion.

B. & A. Monroe for plaintiffs; *Morehead & Reed* for defendants.

Combs *vs* Stewart, &c.

CHANCERY.

Case 120.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Parties and Privies. Grants. Easements.

September 18.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

Parties & privies only are bound by decrees.

As neither Bakewell, nor any person deriving title from him, was a party to the suit and decree for foreclosure in favor of *Honore &c.* vs *Bell &c.*, under which Combs purchased, and as the complainants in the mortgage suit and the purchaser, had notice of Bakewell's deed and title, any interest which Bakewell or his alienees had in the land sold under the mortgage, was not extinguished by the decree and sale.

If the provisions relative to the alleys in the deed to Bakewell, were mere personal or collateral covenants

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COMBS vs STEWART, &c.

A collateral covenant that a vendee shall enjoy a particular easement not part of the conveyance, passes no right to a subsequent vendee. But a deed in which the right of ingress and regress is secured to the grantee, passes such right to every subsequent vendee.

A mortgage was made by Bell to the Bank of the U. S. after a grant of an easement by mortgagor to Bakewell. The Bank of U. S. foreclosed their mortgage & sued: the sale does not extinguish the right to the easement, the grantee of the easement not being a party to the decree of foreclosure.

by the grantor, with respect to his own land not conveyed, they would not bind his subsequent vendee of that land, whether he had notice or not. But the deed contains a grant of the right of ingress and regress in the alleys therein described, and this grant created an interest in the land in whosesoever hands it might afterwards be by grant from the same vendor.

The mortgage by Bell to the Bank of the United States, therefore, passed the title subject to this easement. And although the lien of Honore against Bell's vendor was paramount to the grant of the easement by Bell to Bakewell, the sale in satisfaction of that lien did not extinguish the grant because the person entitled to it was not a party to the suit.

Then the question is as to the extent of the grant and of the easement intended to be secured by it. Upon this subject the case is not free from difficulty. But looking to all the provisions on the subject, to the condition and use of the adjacent property, conveyed to Bakewell, and to which the easement was intended to be annexed, and to the condition and use of the alleys at different periods up to the time of the purchase by Combs—we are of the opinion that no right in the alleys is granted by the deed to Bakewell, except that of ingress and regress; that the covenants to keep the alleys open, relate to that right and were intended to secure it, or that if they go farther, they do not give an interest in the land, nor bind the assignee of the covenantor any farther than this: that the assignees of the grantor may therefore use the alleys in any manner not inconsistent with the use of them by the grantor of the easement or his assignees for the purpose of convenient ingress and regress for themselves, servants and property.

The extent and nature of the easement determined from the facts of the case and the grant.

And in view as well of the extent and situation of the alleys and of the buildings adjacent thereto at the time, as of their condition and the use made of them by the parties since, and especially at the date of the decree and sale and for some years before; and considering that the head of the corporation then holding title under Bakewell, and from which the present claim-

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ants derive their title, was present at the sale of the land on which the alleys are situated, and made no objection or reservation; we are of opinion that the easement granted being only the right of ingress and regress, should be understood as embracing such right only as might have been enjoyed under the circumstances existing and acquiesced in at the time of the purchase by Combs, and, therefore, as not including the right of ingress and regress by carts or other vehicles drawn by beasts of burthen, but only by persons on foot with such burthens or packages as they might transport. And that the convenient use of this right is all that the Chancellor is bound to protect; whence it follows not only that the obstructions as existing in the alley at the time of the decretal sale, should not be deemed inconsistent with the right of ingress and regress granted to Bakewell, but that other uses of the alley by Combs, essential to the advantageous enjoyment of his own property and not inconsistent with the convenient use of it by the owners of Bakewell's lot for ingress and regress should not be prohibited or restrained. We are satisfied that the insertion of posts in the soil of the alley for the purpose of erecting a porch, the first floor of which would be ten feet above the ground admitting a passage for persons with burthens and with wheel barrow and hand barrows without obstruction, would not be inconsistent with the convenient exercise of the right as above defined. And as the right of ingress and regress does not require that the entire alleys should be kept open, *a solo usque ad cœlum*, we do not consider the covenant to keep them open for ingress and regress, as implying the obligation to cover no part of them, or to leave them entirely uncovered for the free admission of light and air throughout the whole space. There was and is no doubt a right under the grant to light and air in the alley so far as necessary for convenient ingress and regress from the adjacent streets to the back part of the lot conveyed to Bakewell, but for no other purpose. And it is clear that, although the floors of the porch may obstruct the access of light to

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Combs vs Stewart, &c.

some extent, it can be no serious obstruction to the passage of air. And we are satisfied that it would not obstruct either so as to impair the convenient passage along the alley. But the right was obtained by Bakewell for the purpose of admitting persons and property that is goods through the alley into and upon the back part of his lot on which he shortly after erected, as he had a right to do, a house for the reception of goods from the alley. And at the time of the purchase by Combs and for many years before, an apparatus had been attached to the outside of this house and suspended over the alley fitted for hoisting packages from the alley into the second story of the house, for which purpose it had been used. This was a rightful use of the alley within the grant, and we are of opinion that Combs has no right to obstruct the convenient exercise of this use by the erection of a porch opposite the end of the house referred to, and so near to it as to interfere with the hoisting of packages, barrels, &c., from the alley into the second story by a crane or block and tackle suspended over the alley. As the alley is only ten feet wide, and the porch will leave a space of only three feet next the house referred to, which is proved not to be enough to admit of the hoisting of heavy articles, we think the porch would, to this extent, be an infringement of the easement to which Stewart & Owen, holding under Bakewell's deed, are entitled. And Combs should, therefore, be restrained from extending that part of his porch which is opposite to the house referred to, to such a width as to obstruct the easement in the particular first mentioned. As the house appears to be of no great width, we suppose the convenient exercise of the right of taking goods from the alley into the second story of the house would require the porch to be drawn in to the extent shat it is opposite to the back building of Stewart & Owen. And we should be disposed to adopt this conclusion the more readily as the counting room of Stewart & Owen, situated on the ground floor of the back building would thereby receive more light, an object which, although

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not secured by the deed, should be regarded as far as is consistent with the rights of Combs, and which he himself would probably be disposed to regard so far as his own interest might allow. We do not regard the deed of Bell as making this alley a street, or as dedicating it in any manner to the public, but as granting a private right of passage only.

It follows from the view which we have taken, that there was no error in allowing a gate or door to remain at the end of the alley to be kept open during the day, &c., but that it was erroneous to direct the removal of obstructions actually existing in the alley, and to restrain and prohibit the erection of the porch; and that there should have been no further restraint than as above indicated, the proper extent of which should be referred to the master for enquiry and report, but to be settled finally by the Chancellor.

Wherefore, the decree is reversed upon the original errors, and the case remanded for proceedings and decree in conformity with this opinion.

J. & W. L. Harlan for plaintiff; *Loughborough & Ballard and Pirtle & Speed* for defendant.

Jackson's Admr. *vs.* Sublett.

CHANCERY.

ERROR TO THE LOGAN CIRCUIT.

Case 121.

Femes covert. Remainders vested and contingent.

JUDGE GRAHAM delivered the opinion of the Court.

September 2.

ON the 7th of January, 1846, Samuel D. Sublett executed to Mary Jackson, executrix of John Jackson, deceased, his note for $380, due twelve months after date. The payee died, and in 1848 Francis W. Jackson, a son of her intestate, brought an action and obtained a judgment at law, upon which an execution issued, and was levied by the Sheriff upon a negro man named Daniel. Mrs. Margaret Subtlett, the wife of the defendant, claimed the negro as her property, and a jury empaneled by the Sheriff to try the right of property, found

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JACKSON'S AD'R. vs SUBLETT.

a verdict that the negro was not subject to sale to satisfy the execution. The plaintiff having indemnified the Sheriff, he was about to sell the slave, when said Margaret Subtlett, by her next friend, filed this bill in chancery to prevent the sale.

The grounds of complainants for relief-John Jackson's will.

The facts upon which she founds her claim, and which are not controverted, are, that in the year 1838 John Jackson, the father of said Margaret, made and published his last will and testament, and died before April 1841, at which time the will was admitted to record. By his will he gives to his wife a life estate in his negroes and some other property, and makes a few specific devises and bequests to others, and then in the fifth clause says; "It is my will and desire that all of my negroes not herein otherwise disposed of together with their increase, (should there be any,) likewise all the living stock that may be in my wife's possession, be as equally divided as possible, at her death, between my daughters Margaret C. Sublett, Martha W. Sloss, Mary Ann V. Atcheson and Antheline E. Jackson, should any of them die before such division, their children are to have their mother's share." The widow of the testator died in the year 1847. After her death, the slaves alluded to in the clause just quoted were by the husbands of the daughters (Antheline having in the meantime married Valentine) divided between them. The slave Daniel, with others, fell to the share of Sublett, who immediately took him into possession, and whilst in his possession the execution against him, was levied upon the slave as already stated.

The provisions of the act of 23d February, 1846, relied upon.

The complainant claims that by the will of her father, she has an interest in the slave separate from her husband, and that by the act of Assembly, approved February 23d, 1846, entitled "an act further to protect the rights of married women," the said slave is not liable to be levied on or sold for the debts of her husband. That act among other things says, "that the slave or slaves of a married woman shall, hereafter, within this Commonwealth, be held and taken to be real estate, in so far that no slave or slaves, or the increase

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thereof, which any such married woman may have at the time of her marriage, or which may come, descend or be devised or given to her during her coverture, shall be liable to the debts of her husband, or be attached, levied on, or sold, for his debts, or liabilities of any sort or kind, whether such liabilities accrued before or after marriage; nor shall the life estate of the husband, his wife living, be levied on executed or sold, for any such debts or liabilties." This act is not confied in its operation to marriages subsequent to its date, nor so far as the question of the liability of property to levy and sale is concerned, is it important at what period the debts were incurred by the husband.

To render the property, slaves, &c., of the wife, liable for debts, &c. The debt must "be contracted or created jointly in writing by husband and wife."

Before examining into the meaning of that portion of the law already quoted, we will dispose of another question raised by the plaintiff in error, viz, that the consideration of the note sued upon was necessaries furnished for the family of complainant, and, therefore, the slave is not exempt from levy and sale. Without determining whether the proof is sufficient to establish the fact, the proposition is answered by saying that the debt was not "contracted or created jointly *in writing* by husband and wife," and, therefore, does not come within the provision of the statute which makes the property of the wife in such case liable.

A vested remainder in slaves, which vested prior to the act of 23d February, 1846, entitled "an act further to protect the rights of married women" but which did not come to the possession of the *feme* until after that date, when the life estate determined. held to be liable for the debts of the husband of the tenant in remainder.

The only remaining and important matter to be determined is, whether the complainant has such a separate interest in the slave in contest as to exempt him from levy and sale to satisfy the husband's debts. We learn from the decree in this cause, that inasmuch as the life estate did not terminate, and a division of property was not had among the daughters or their husbands, until the year 1847, the Judge regarded the slave as not having "come" to the complainant until a period subsequent to the act of 1846, and as, therefore, not liable to the husband's debts. Whether the Legislature, by the use of the word "come," intended to apply it to the *time* when *actual posession* and *use* should take place, or to the time when the wife should acquire an interest in the property by any other means

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than by descent or devise or gift during coverture, we deem it unnecessary to determine. But if the act was intended to have reference to the time only when possession came, although the legal right to the property had previously vested in the husband, according to the law in force before its enactment, then we think it should be regarded as inoperative, because the Legislature cannot take away vested rights without giving an adequate compensation therefor. Did the will of her father give her such an interest in the property, as was vendible, or was transmissible by bequest or descent, previous to the death of her mother?

"Vested remainders are those by which a *present interest* passes to the party, though to be *enjoyed* in future, and by which the estate is invariably fixed to a determinate *person* after a particular estate is spent:" (5 *Dana*, 441.) "When the absolute property in a fund is bequeathed in fractional interests in succession, at periods which must arrive: as to, or in trust for A for life, and after his death to B, the interests of the first and subsequent taker will vest together, and notwithstanding B may die before A his personal representatives will be entitled to receive the legacy upon the death of A." (1 *Roper on Legacies*, 394.)

Bowling's Rep's. vs Dobynis Ad'r. cited and approved.

The facts in the case of *Bowling's Representatives* vs *Dobyns Administrator*, (reported in 5 *Dana*, 434,) seem to be very analagous to the present. In the last will of Robert Bowling, made in 1809, is the following clause: "I give and bequeath to my dearly beloved wife, Polly, *all my estate during her natural life*, (except four hundred dollars worth of horses, which I give to Hanson Price.) And after my wife's *death* it is my will and desire that my son, Samuel Bowling, shall have two mulatto men, named Hanson and Dennis; and the *balance of the whole of my estate, after all just debts are paid, and schooling my two children, Samuel and Nancy, shall be equally divided between my two children Samuel and Nancy.*" In that case Samuel Bowling had died leaving his mother living. The administrators of Dobyns brought a suit in chancery for a settlement of

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partnership accounts between Bowling and Dobyns, and for a decree to subject his estate to satisfy the amount which might be found to be due to Dobyns. A certain sum having been ascertained to be due, the Court below, among other things, decreed that the aforesaid remainder in the slaves, left by the will of Bowling's father, to his mother for life, in remainder to himself and sister, should be sold, &c., and the question was thus presented to the Appellate Court whether Samuel Bowling had such a vested interest in the estate devised to his mother for life remainder to him and his sister, as could be subjected and sold for the payment of his debts. In construing that portion of the will, which has been already quoted, the Court say, "the testator evidently intended to make a disposition of his *whole estate* for life to his wife, and in remainder to his two children, which constituted the whole fee simple in his entire estate. To be *divided between my two children* includes not on only a *devise* to them, but also the character of the devise, to-wit, a tenancy in common, and while he vests the title of the whole fee simple estate in his wife and children, he does not carve out of it or *vest* a title in any one for payment of debts," &c. (*Ibid*, 439.) Divest that will of so much of it as speaks of the horses given to Price, the negroes given specifically to Samuel Bowling, and the charge for paying debts and schooling children, the remaining portion of it is almost precisely like Jackson's will in this case.

A vested remainder gives an immediate fixed right of future enjoyment—an estate *in presenti*: (1 *Cruise*, 181.)

"The person entitled to a vested remainder has an immediate, fixed *right of future enjoyment*, that is, an estate in *presenti*, though it can only take effect in possession and pernency of the profits at a future period: (1 *Cruise*, 181.) Again: "If there be a lease for life to A, remainder to B for life, although the remainder to B for life, may possibly never take effect in possession, because B may die before A, yet from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of A. It is, therefore, vested in interest, though perhaps so vested that it may determine by B's death

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before the possession he waits for may become vacant." (*Fearne on Contingent remainders*, 329.)

These and other authorities quoted in that opinion, brought the Court to the conclusion that although the life estate of his mother had not terminated at the death of Samuel Bowling, yet his interest in remainder in the slaves, was such as could properly be subjected to sale to satisfy his debts. In this case the devisee in remainder survived the mother to whom a life estate was given by the will; that fact, instead of weakening, increases the weight of the authority in *Bowling* vs *Dobyns*. But there is a slight difference in the two wills. By Jackson's will, if either of his daughters should die before the division which is directed to take place at the mother's death, the children of the one so dying shall take their mother's share. If Mrs. Sublett had died before the division, although an estate was vested in her, it would by her death have been divested, and would have passed to her children, instead of remaining in her husband. That contingency does not affect the case.

A devise over upon a contingency does not prevent the legacy from vesting in the meantime, provided the words be in other respects sufficient to pass a present interest: (*Roper on Legacies*, 403.)

"A devise over upon a contingency has not the effect of preventing the shares of legatees from vesting in the meantime provided the words of bequest be, in other respects, sufficient to pass a present interest. (1 *Roper on Legacies*, 403.) Hence if a legacy be given to A to be paid at twenty-one, and if A die before that time then to B, the legacy will vest in A at the death of the testator, subject to be divested in the event of his dying under twenty-one: (*Ibid*, 403.) In this and such cases, the legacy vests immediately, *sub modo*, i. e., subject to be divested upon the happening of the contingency, upon which it is given over:" (*Ibid*, 404.) We deem it it to be unecessary to extend this opinion by reference to other authorities. It seems to us to be very clear that by the will of John Jackson, deceased, his four daughters, of whom Mrs. Subtlett was one, took a vested fee simple interest as tenants in common in the slaves immediately on the death of the testator.

It has been adjudged that a vested remainder in slaves

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accruing to a *feme covert* vests in her husband, so that if he survive the wife and the particular estate expire in his lifetime, he may bring a suit in his own name to recover them without administering on the estate of his wife: (6 *Litt.* 335; 7 *Mon.* 216.) The husband has acquired possession, and his legal title is thereby full and complete. From this view, it results that the slave being the property of Sublett, was at law liable to be levied on and sold by execution against him.

A vested remainder in slaves accruing to a *feme covert*, vests in the husband, and if the particular estate determine in his lifetime, he may sue if he survive the wife, without administering on her estate: (6 *Litt.* 335; 7 *Mon.* 216.)

This is not a case where the creditor is seeking the aid of a Chancellor to subject to his demands against an insolvent or improvident debtor, property which accrued to the debtor through his wife, nor is the bill framed to meet such a state of case. In this case the wife comes into Court asking the Chancellor to prevent the creditor from exercising his legal remedies against the husband, solely because of her supposed separate and exclusive interest in the property. Having come to the conclusion that she has no such separate right in the slave Daniel, it follows that the decree of the Circuit Court is erroneous.

It is, therefore, reversed and the cause remanded to that Court with directions to dismiss the complainant's bill.

Wilkins for plaintiff; *Temple and Owens* for defendants.

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Tibbatts, &c. *vs* Berry, &c. Same *vs* Ward, &c.

WILL CASE.

APPEALS FROM THE CAMPBELL CIRCUIT.

Case 122.

Wills. Parties. Trustees. Remainders. Heirs.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

September 25.

THE County Court of Campbell county having at its November term 1848, rejected the will of Gen. James Taylor, a writ of error was, on the 22d day of March following, sued out from the Campbell Circuit Court by G. W. Berry and R. T. Thornton, as trustees named in

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TIBBATTS, &c. vs BERRY, &c. SAME vs WARD, &c.

said will, and on the 12th day of June following, a writ of error was sued out from the same Court in the name of Ward and wife, and Foote and wife, and John E. Harris, both for the reversal of the same order of said County Court rejecting the will. But John E. Harris having died before any of the proceedings in Court, this last writ stands in the name of the other parties. Upon each writ a summons issued against James Taylor, jr. and H. T. Harris and wife, J. W. Tibbatts and wife and G. T. Williamson and wife, being the four heirs of the decedent and the husbands of the female heirs. The summons on the second writ also included the widow of the decedent, and Berry and Thornton, trustees, who were plaintiffs in the first writ. The summons in each case was executed on all the persons named therein except Williamson and Wife, who resided in Cincinnati, but who having had due notice of the proceeding, appeared in each case and entered themselves as defendants, and they and Tibbatts and wife, who were also entered as defendants, seem to have been the only contestants of the will in the Circuit Court. A trial was had in each case, and in each case a judgment was rendered, reversing the order of the County Court, and establishing the will, with the proper orders for its being recorded in the Circuit and County Courts, and a judgment for costs against the defendants in error. And Tibbatts and wife and Williamson and wife having appealed from each of these judgments, the two cases though tried separately in the Circuit Court, have been heard and submitted together in this Court, not as one case, but as two cases presenting substantially the same questions, except as to the question whether the respective plaintiffs in the two writs of error from the Circuit Court to the County Court, had such interest as authorized them to prosecute such writs.

The probate of a will before a court of competent jurisdiction, is binding upon all persons, whilst it remains

The two cases on *Wells' Will*, (5 *Litt.* 273, *and* 4 *Mon.* 152,) and the case on *Singleton's Will*, (8 *B. Mon.* 340,) and other cases recognize and establish the principle that under our system for probate of wills, and indeed as necessarily flowing from it, the probate or rejection

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in force—subject only to reversal by appeal, writ of error, or bill in chancery under the statute of 1797.

of a will by the proper tribunal having the case regularly before it, is like a sentence, *in rem*, conclusive, while it remains in force, in the same and in all other Courts, and between all persons, whether formal parties to the record or not; and that the proceeding for the probate of wills is in the nature of a proceeding *in rem*, presenting the question of will or no will, not as a mere question of property which can be effectually decided only between the parties to the record and their privies, but as an abstract question, the decision of which by a competent tribunal, having the question properly before it, is while it stands binding upon all the world. By whom and in what manner this question may be presented, is a matter regulated by law. And as a will may be proposed for probate in the County Court by any person interested in its establishment and may be contested there by any one having an opposite interest, and may without contest and on *ex parte* proof be there established or rejected with conclusive effect except so far as the sentence is subject to reversal; and as any person interested against such sentence, whether a party to the original record or not is authorized by the act of 1842, (3 *Stat. Law*, 586,) to prosecute a writ of error from the Circuit Court, whereby the question of probate, that is the question of will or no will, is brought fully within the jurisdiction of that Court, which is authorized to try the case not merely upon the record of the County Court, but upon original evidence, as if it were a Court of original jurisdiction, it seems to follow that if the writ of error be prosecuted by a competent party, and a final decision of the question of will or no will be had, it must have the same effect as if all parties interested on the same side had united in the writ, and that if proper parties for contesting the reversal be also before the Court, its sentence, like that of the County Court, must be conclusive upon all while it remains in force, and subject only to an appeal or writ of error, and to the remedy for contesting the validity of a will by bill in chancery under the 11th section of the act of 1797.

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The third section of the act of 1842, *supra*, expressly provides that the judgment of the inferior Court shall not be reversed here because all the persons interested in the will were not made parties to the controversy in that Court. The object of the writ of error being to reverse the decision of the County Court, and to bring before the Circuit Court the question of will or no will, it is doubtless the duty of that Court to take care that the parties interested in maintaining the judgment shall have an opportunity of doing so, and that the contest proposed by the writ of error shall not be a merely pretended controversy. But the provision just referred to, shows that it is not necessary that all persons interested in the question should be actual parties. And even if the provision should be confined to those persons who are interested in sustaining the will, it corroborates the position above stated as to the sufficiency of the writ of error prosecuted by any party interested in maintaining the will, and as to the conclusiveness of the sentence, if such writ be prosecuted by a competent party. Whether any other persons who may be interested in supporting the will, should be summoned upon the writ of error prosecuted by one or more, having such interest, may be a matter within the discretion of the Circuit Court. But if the actual plaintiffs have an interest, and are thus competent to prosecute the writ and present the question, and if the parties appearing to be interested against the will are before the Court, the proceeding would seem to be perfect in point of form, and such as to authorize a decision conclusive upon all persons whether parties to the record or not.

The Circuit Court is not to reverse because all persons interested in the will were not before the County Court—but that Court should have all the parties interested in maintaining the will, before the Court.

As one writ of error by a competent party brings up to the Circuit Court the whole case, and presents the question entire and not divisible on the ground of parties or their interests, and authorizes a decision which shall be binding upon all interests, it must be considered as if it were prosecuted for and by all parties interested on the same side as the actual plaintiffs, and as, therefore, precluding any subsequent writ by any other of these parties, as completely as it precludes one by the

A writ of error may be prosecuted by an interested party to the Circuit Court, which brings up the whole question of will or no will, & precludes a second writ by another party interested on the same side.

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actual plaintiffs. The anomalous consequences of allowing two writs in such a case, are sufficiently illustrated in the present records, which contain two distinct judgments reversing the same indivisible sentence, and two distinct mandates establishing the will and directing it to be recorded. If the cases were properly distinct so as to admit of distinct trials and judgments, there might have been different testimony and a different result in the two cases, and the still greater anomaly might have been exhibited of a judgment and mandate affirming the sentence of the County Court and rejecting the will, and another mandate of the same Court, rendered at the same term, reversing the same sentence of the County Court, and establishing the same will and ordering it to be recorded.

The statutory system of Kentucky for proof of wills, does not admit of two writs of error by different persons having the same interest in the proof or rejection of the will: but the Circuit Court cannot dismiss two writs, both brought by competent plaintiffs, because they are so brought, nor dismiss the first before trial, because a second is brought and pending.

Our statutory system of probate does not admit of such consequences. If the plaintiffs in both writs were competent to prosecute a writ of error to the judgment of the County Court, they might have been required to unite as plaintiffs in one of the writs, or they might have been consolidated in some form; or if not, as the trial and judgment upon the first writ decided the whole case upon the question of admitting the will to probate, there should have been no trial on the second writ. And if under the doubts entertained as to the competency of the respective plaintiffs to maintain a writ of error in the case, it might have been prudent to make the final disposition of the second depend upon the final decision of the question of competency arising on the other, so that there might be a future trial on the second writ, if the first were unavailing, this might have been provided for without the expense of an actual trial. But as the Court was not bound to notice, while one case was before it, what had been or might be done in another, the course to be pursued in the case of two writs, as above supposed, must in a great measure depend upon the movements of the parties, and the extent to which the proceedings in one case are brought to notice in the proceedings in the other. And in revising the opinions and acts of the Circuit Court, this Court

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can only see what was in each case before that Court when it acted.

It appears then that after an ineffectual motion by Williamson and wife to remove the case from the Campbell Circuit Court into the Circuit Court of the United States for the district of Kentucky on the ground that they were non-residents and the plaintiffs in the writ residents and citizens of Kentucky, and after a like ineffectual motion by the contestants to continue the case on the ground of the absence of a witness, and of the absence also of the counsel who had been engaged to appear and manage the case for the same parties, a motion was made in each case by the contesting parties to dismiss both writs of error, and to dismiss each, and on this motion, in each case, the writ of error in the other case was read, but no other part of the other record, and the motion was, in each case, overruled. It is now contended, on the authority of the cases of *Carr* vs *Callaghan*, (1 *Marsh.* 22,) and *Castleman* vs *Holmes*, (7 *Mon.* 591,) that this motion should have prevailed. The motion was made solely on the ground that the two writs of error could not both be prosecuted, because the judgment being joint did not admit of several writs of error, and on the further ground that the plaintiffs having improperly sued out several writs, had no right to elect between them, or to amend either at their option, and that consequently both should have been dismissed. The interest of the respective plaintiffs, authorizing them to prosecute a writ of error, is not denied, but is rather admitted in this argument, and was not disproved on the motion. It cannot be assumed, in deciding on this preliminary motion, that none of the plaintiffs were competent. Berry and Thornton are described in their writ, as trustees named in the will, and, *prima facie*, had an interest under that description. If the plaintiffs in the other writ had no interest, their prosecution of a separate writ, furnished no possible ground for dismissing both writs. And if all the plaintiffs are assumed to have been competent, then as the first writ was maintainable in the name of

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the plaintiffs therein, without the addition of others, the prosecution of a subsequent writ by other competent parties furnishes no reason for dismissing the first writ. The cases referred to do not apply, because in a case of probate any party interested may prosecute a writ of error singly, although their be other parties interested on the same side of the question, but in the case of a joint decree or judgment for money or property, the unsuccessful parties have not a right to prosecute separate writs of error. It is true, that if in the present case, if each writ is valid, both ought not to be prosecuted, because either being sufficient for the whole case and for all parties, there may be, in addition to other reasons, the same objection to the prosecution of both as to the prosecution of two suits for the same cause by the same plaintiff, but this objection affects the second suit and not the first, and does not, even at law, prevent an election unless presented in a particular manner.

Where there appears a defect of right on the face of the writ of error to prosecute it, the Court may quash or dismiss it unless amended—yet if it show no right on its face, yet aver a right or interest, the Court will not dismiss without examining into that right. It might require the party to show *prima facie* a right.

If, on the face of each writ of error, it had appeared that the parties plaintiffs therein had no right to prosecute the writ in which they were plaintiffs, it might have been proper to quash or dismiss both writs on motion, unless an amendment had been proposed by which the objection would have been obviated. And so it might have been proper to dismiss either writ separately, if on its face the plaintiffs therein appeared to have no interest which authorized its prosecution. But, as already stated, the writ of Berry and Thornton expressly showed a *prima facie* interest in the will. And although the writ of Ward, &c., did not state their connection with the will, nor the character or interest claimed by them, yet as it did not show that they had no interest, and as their allegation that they were injured by the rejection of the will implied a claim under it, we think the Court was not bound on this preliminary motion, and in the absence of all evidence, to assume that they had no interest. It might have been proper, in point of form, to state in the writ of error the nature of the interest claimed, or the character in

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which the plaintiffs sued out the writ, and they might perhaps have been required to amend the writ accordingly, or to show their interest. But as this was not done, and as all the facts on which their interest and right to prosecute the writ depend, were afterwards fully developed in each case, we certainly should not send the case back to be dismissed on this motion and for the formal defect in the writ of error, if it appears on the whole record that these plaintiffs have an interest under the will. Then, although the other writ showed *prima facie* an interest in the plaintiffs therein sufficient to prevent its dismissal, yet as it contained no conclusive evidence of that interest, and no further evidence was produced on the preliminary motion to dismiss the second writ, it would have been improvident to dismiss this last on the ground that there was a prior writ by different parties, who stated themselves to be interested, but whose interest was not otherwise proved as against the plaintiffs, and who might finally have failed for the want of sufficient interest.

We do not perceive, therefore, that under any assumption which the Court was bound to make or could properly make on these preliminary motions, there was any error in overruling eitheir of the motions above referred to. As to which, we further observe, that if this proceeding be at all subject to the rules applicable to ordinary cases, neither of the motions could properly have been made in either case, except the motion to dismiss the particular writ then before the Court for trial, because the parties to that writ alone were before the Court on the motion, and the mere reading of the other writ, as between those parties, did not subject it to the power of quashal or dismissal.

The Court will look into the will itself to see the interest of parties contesting it.

It appears, however, that after the will was in each case fully proved, and without opposing testimony upon any point involved, and while the will was before the Court showing the nature of the trust to Berry and Thornton, and when it had been proved that the plaintiffs in the second writ of error were the daughters of Mrs. Harris, a daughter and devisee of the decedent,

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and the question of their interest was dependent on a construction of the will. The contestant upon these facts and upon proof that Mrs. Harris had other children besides the plaintiffs in the second writ, and that the two daughters of the decedent who were contesting the will had each several children living, moved the Court in each case to dismiss the writ therein for want of interest in the plaintiffs therein, and also because the proper parties were not before the Court. And upon these motions, which were overruled, the question whether the trustees in the first case, and in the second case whether the grand children of the testator have any interest under the will was fully and fairly presented.

On motion to dismiss a second writ of error, brought by others who were also interested in the will, and no proof of what was decided under the first writ, it was properly overruled.

Before coming to the consideration of this question, which is the real matter of contest between the parties attempting to establish the will and those who oppose it, we remark that the plaintiffs in these writs appear to to have summoned all persons having an apparent interest in opposition to the will, and the omission to summon the children of the contestants or others who have the same interest that the plaintiffs have, was no ground for dismissing either writ, as is evident not only from the provision of the statute already referred to, but also from the nature and effect of the proceeding as before explained. And further, although when this last motion was made as to the second writ of error, there had been a trial on the first and a judgment establishing the will, and thus in effect affirming the right of the first plaintiffs to prosecute their writ, and although the plaintiffs in the second writ and all others were entitled to the same benefit from this judgment as the actual plaintiffs in the first writ were, still not only was this judgment appealed from, and its validity dependent upon the final decision of the question of the interest of the plaintiffs therein, but in fact it was not shown in the trial on the second writ, nor on the final motion to dismiss it, that there had been any trial or judgment in the first writ, nor indeed that it was still pending. For these reasons and because the final motions to dismiss were made expressly on the special

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grounds of defect of parties and of want of interest in the plaintiffs respectively, the first of which has been disposed of, the only remaining question on the final motions to dismiss is, whether the respective plaintiffs had such interest as authorized them to prosecute a writ or writs of error.

The statute of 1842, allowing writs of error from the County to the Circuit Court in will cases, does not define the nature of the interest which the plaintiff must have in the provisions of the will or its rejection, but allows a writ of error or appeal by *any person interested.*

The statute (3 *Stat. Law*, 586,) does not define the nature or extent of the interest which may be requisite or sufficient, but enacts that any person *interested* may prosecute a writ of error or appeal from the decision of a County Court refusing or granting probate, &c. It is sufficient if the plaintiffs have any interest. And the Court must use its power over the proceeding to prevent a party, having but little interest, from betraying or sacrificing the rights of other parties having a much greater interest on the same side. We proceed then to enquire, first, as to the plaintiffs in the first writ of error, and then as to the plaintiffs in the second writ, whether they have any interest under or in the will, which authorized them to proceed by writ of error, to have it admitted to probate.

By the seventh clause of the will, a large tract of land is devised to the testator's three daughters, to be equally divided between them, and they to have the sole and exclusive use and benefit of the same and the rents thereof during their natural lives, and at their decease to go and descend to their heirs forever. If his said daughters desire it, 120 or 150 acres of this land is to be laid off into lots and sold and conveyed in fee or perpetual lease as they may choose, and to effect this object the Circuit Court may appoint a trustee, &c. In the second clause of the second codicil the seventh clause is referred to, and the testator revoking the power therein given to the Court, appoints W. J. Berry and R. T. Thornton trustees, and directs them to lay off 200 acres on Licking river, adjoining the town of Newport, as an addition to the town—that they shall lease out one half of the property for fifty years or for a different term if they deem it best and most profitable to testator's heirs—at the expiration of the leases the

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property to revert to such of testator's children or their heirs, to whom the same may have been assigned by said trustees—who are to divide the leases between the three daughters, and at the expiration of the leases, the title to vest in the heirs of the daughters to whom the leases were assigned. The other moiety of said ground or lots, the trustees are to sell and convey to the purchasers—the sale to be on such terms and conditions as like sales are made—"they, the said trustees, holding the legal title to the property until the same is paid for in full." The funds arising from such sales the trustees are to invest in improved or productive property in Newport, Cincinnati, or Covington, yielding a fair rent, or, if the daughters prefer it, they may have houses for rent erected, &c. A subsequent clause requires that the property acquired and purchased by the trustees from the above described fund, they are to divide equally between the testator's three daughters, "who are to have and to hold the same during their natural lives, and to receive the rents and profits thereof, and at their death the remainder, in fee, to vest in their heirs forever, *and the said trustees are to cause the titles to be made in this way to them.*" An intermediate clause provides that such trustees shall receive from the proceeds of the sales of said property a fair compensation for their services in laying out, selling, leasing and building on it, and are to keep an accurate account of expenses, &c.

It would seem from the direction that the trustees should hold the legal title to the land or lots sold by them until payment of the purchase money, that the testator considered the title to be in them. And as it would be more convenient and more intelligible to purchasers that the title should be in the trustees, who were to sell and convey the lots, than that it should be in married daughters of the testator, but to be sold and conveyed by the trustees, we think it highly probable that he intended to put the title in the trustees. It would certainly not be a strained construction of the words "they holding the legal title," to consider them

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as sufficient together with the appointment of the trustees, to invest them with the title. But although we might be inclined to the opinion that this construction, conforming to the powers and duties of the trustees, would meet the probable intention of the testator, we do not suppose that the trustees cannot be otherwise interested in the will, than by having the legal title of the land. Conceding that they have not the legal title, and therefore have no legal interest in the land itself, have they not an interest in the will, and in the question of its rejection or establishment?

Trustees appointed to execute important trusts are such parties in interest as may prosecute a writ of error or appeal from a decision of the County Court against the validity of the will.

They are trustees appointed by the testator to execute and carry out his will in a very important matter. They are to lay off 200 acres of land, presumed to be very valuable, into town lots, one half to be leased by them for long terms, and they are to divide the leases between the three daughters, &c. The other half they are to sell, and the proceeds are to be invested by them in other city or town property, (except so far as the daughters may desire it to be expended in the erection, for rent, of buildings by the trustees on their lots, &c.,) and the trustees are to cause the title to the property, acquired by this fund, to be so made that the three daughters between whom it is to be divided, are to have and to hold the same during their natural lives, and to receive the rents and profits thereof, and at their death the remainder in fee to vest in their heirs forever.

These 200 acres may, it is true, form a small part of the very large estate disposed of by the will, and it would seem that a portion of the 200 acres was, after the date of will, conveyed by the testator to W. J. Berry, one of these trustees, in trust for purposes substantially similar to those in the will. But even the remainder is presumed to be very valuable. But however this may be, and whether the trust extended to the whole or to a part only of the estate devised by the will, the question of interest in the trustees is the same, and it seems to us they have an interest in the will which authorizes them to prove it, if not for their own benefit, for that of others, whose rights and interest it

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is their duty to protect by the express terms of the trust. Suppose the trust, as expressed in the will, had extended to the whole of the testator's real estate, whether great or small, and that his daughters being his only heirs, had had no children at the time of his death but were then married, it might be that the daughters and their husbands being opposed to the will, it might be rejected in the County Court at their desire or for want of proof; what, in such case, is to become of the interest intended to be secured to the expected issue of these daughters? Have the trustees, who are to sell the land and invest the proceeds in other land to be so conveyed that at the death of the daughters, the title shall vest in their heirs, a right to abandon this duty expressly enjoined on them, and to sacrifice the interests specially committed to their protection, at the will of the heirs who have a counter interest? Nay, the question is whether they must abandon this duty and suffer the interests committed to them to be thus annihilated, because, or when the person whose interest is intended to be secured by the will are not in being? Surely there must be some person authorized to sustain the will of the testator, and to preserve and to protect the interest intended to be thereby created and secured; and, in the case supposed, the trustee appointed for the very purpose of carrying out the will in this respect must be authorized to maintain the will itself, which is the foundation not only of his power and duty, but of the rights and interests for the sake of which the power and duty are created. He is trustee of these powers and rights and interests, not indeed for his own benefit, but for the benefit of others. And although he may have no direct interest in any visible part of the estate or its proceeds, nor any personal pecuniary interest in the trust, he represents and in effect holds the interests of others which it is his duty to maintain, and which depend for their existence on the establishment of the will. We think that such a trust is itself an interest in the will, or in the question of will or no will, which authorizes the trustee to prove the will and to

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prosecute a writ of error to reverse an order rejecting it. And the principle is the same, whether the intended beneficiaries of the trust are in being or not, and especially when, although there may be persons in being, who, in the existing state of things would be entitled, it is uncertain whether they are the persons who will be entitled in the event.

Trustees who are required to execute an important trust confided by a will, and who are to be paid for their services, are such interested persons as may prosecute a writ of error or appeal from a judgment of the Court rejecting the will: *Ellison* vs *Arrey* 1 *Ves. sr.* 115.)

An interest is also claimed for the trustees on the ground of the direction that they shall be compensated for their services, &c., out of the proceeds of the sales to be made. And this claim seems to be sustained by the decision of Lord Eldon in the case of *Ellison* vs *Airy*, (1 *Vesey, sr*, 115,) where it was determined that such a direction was a legacy to the trustees. But we do not deem it necessary to place the right on this ground, when there is a broader and more satisfactory one in the nature of the trust and in the interest committed to the trustees. And we will not assume that these interests would or could be altogether defeated by the right of the daughters to have houses erected, &c.

We are of opinion, therefore, that the final motion to dismiss the writ of error of the trustees for want of interest, was properly overruled. And the question arises as to the interest of the plaintiffs in the second writ of error. The will contains many devises of land to the three daughters, either separately, or to be equally divided between them, and using the general terms, to have and to hold during their natural lives, or to receive the rents and profits during their natural lives, and at their death, remainder to their heirs forever; or at their death, the title to vest in their heirs for ever or in fee. It is contended that under these devises and others substantially like them, the fee simple vests in the first devisees (the testator's daughters) by the rule in Shelly's case, and that their husbands have, therefore, no interest in the will. Or, that if this be not so, and if the remainders can be kept separate so as to vest in the heirs, as purchasers, at the death of their mothers, respectively, still the two female plain-

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tiffs, though daughters and heirs apparent of Mrs. Harris, one of the devisees for life, are not her heirs while she lives, and may die before her, so as never to be entitled under the will. But the same might be said of all of the present heirs apparent of each of the daughters. And if the argument is sufficient to defeat the writ of error in the name of two them, it would seem to be entitled to the same effect if all of them were plaintiffs. And the consequence would be that if their parents and the executors desired or acquiesced in the rejection of the will, there would be nobody competent to prosecute a writ of error for its reversal, at any rate until the death of the devisees for life, which might not occur for fifty years, when, by the loss of evidence or other circumstances, the proof of the will might become impossible, and when owing to intermediate dispositions of the property, the devises in remainder might be frustrated or greatly obstructed. To these views might be added others of a similar tendency, such as relate to the desirable certainty in titles to lands, and the propriety and policy of a speedy determination of the question of will or no will; and also the express and short limitation of the time for prosecuting a writ of error to a judgment of the County Court rejecting or admitting the will. And it is by no means certain that if the remainder to the heirs be construed to make them purchasers, the heirs apparent should not be considered as having such an interest in the establishment of the will, even though they may have no vested interest in the estate itself, as would authorize them to prosecute a writ of error in the case.

Devisees in remainder have such an interest as authorizes them to prosecute a writ of error or appeal from a judgment of the Court of probate rejecting the will.

But there are, in our opinion, certain devises in the will which, either by explaining the other devises, or by their own direct operation, do show that the children of the testator's daughters have a vested interest in a considerable portion of the estate, or do give such interest in particular parts of it, and if they have such interest in any portion of the estate, that is sufficient. The 29th section of the will, after providing that the testator's daughters might set off to their sons, on ar-

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rival at age and to their daughters on marriage, one half of the estate to which such grandchild would be entitled on the death of the mother, which portion should not be subject to division on the mother's death, says that the remaining half of the estate devised to his daugters, as aforesaid, will go to their children in fee at their demise, and provides that should any of his daughters have a child after the advancement made as above, then such after born child or children shall have their full portion of the estate given to my daughters to be taken out of the part remaining in his daughter's hand until her death. And then follows this explicit declaration: "The intention is that all my grandchildren shall have an equal share of their mother's estate, except John Harris, who is provided for in this will."

In determining the construction of wills, the whole should be considered, and if possible, effect given to the whole will.

This section is justly relied on as showing clearly the intention of the testator not only that his daughters should have no greater interest than for life under the devises referred to, but that his grandchildren the children of each of those daughters should have among them at the death of their respective mothers, equal shares of the estate: that is the property devised to the mother for life. And it is contended that if the section does not itself give an interest to the grandchildren, the explicit declaration of intention contained in it, must control the construction of the devises to which it refers, and that as it shows that by the heirs of his daughters, the testator meant their children, these devises should be construed as giving the estate to the daughters for life, remainder to their children in fee. And that as they had children at the date of the will, and of the testator's death, the remainder vested at the latter period in such of the children as were then living, subject to open and let in those who should afterwards be born.

Such a construction of the devises would repel the application of the rule in Shelly's case, if it should be otherwise applicable as an existing rule. And we should be of opinion that the devises under this construction

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would give a vested interest as contended for, or at least an actual interest, which is sufficient. But as this is not a suit for property but a proceeding to establish a will, and the question now is not as to the extent of the interest of the plaintiffs in the writ, but as to the existence of any interest, the necessity of going into the general question as to the construction and effect of the devises referred to, is, in our opinion, obviated, if not by the specific directions in the second clause of the second codicil, as to the conveyances their provided for, at least, by the specific devise contained in the sixteenth section; in which, after various directions and dispositions relating to his ferries across the Ohio, &c. the testator says: "My children are to have the rents and profits of said ferries during their natural lives for their separate, sole, and exclusive use and benefit, and at their deaths the same is to vest in their children, the children of my son James to have one fourth part of said ferries at his death."

There is no devise of the ferries or the profits thereof to the daughters and their heirs, but a devise of the profits (or say of the ferries) to the daughters for life, to vest, at their respective deaths, in their respective children. It cannot be more than a devise to the daughters for life, remainder to their children respectively. Under this devise we are of opinion that the remainder vested in the children of the daughters who were alive at the testator's death, and in all who might be aftewards born, at the moment of their birth; and that however the remainder in the living children might be affected by subsequent events, as their own death or the birth of other children, it was an interest which authorized the prosecution of the writ by any of them. As to the vesting of the remainder on the death of the testator, the case of *Turner* vs *Patterson*, (5 *Dana*, 296,) and the authorities there cited, and to which others might be added, are referred to as expressly in point.

Though a devisee in remainder may possibly be defeated by subsequent events, yet one who is apparently entitled as devisee, may prosecute a writ of error or appeal from a decision refusing to record the will.

There was no error, therefore, in overruling the motion to dismiss this writ for want of interests in the plaintiffs.

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The twelfth section of the act of Congress of 1783 does not authorize the transfer of suits in progress from an inferior to a superior Court of the State, to the Federal Courts, nor do its provisions apply to will cases, nor to cases where all the parties, plaintiffs or defendants, are not citizens of different States.

As to the other preliminary motions first above stated, but little need be said. The attempt to transfer the case to the Federal Court had no plausible ground to sustain it. The 12th section of the act of Congress of 1783, to establish judicial Courts of the United States, does not, in our opinion, authorize the removal of a suit in its progress from the inferior to the superior or appellate tribunals of the State, and we think it has no application to this proceeding for the probate of a will. And if it were applicable to the case, the fact that the plaintiffs in the writ of error were citizens of Kentucky, and that two only of several defendants were citizens of another State, does not bring the case within the act, because all of the defendants are not citizens of another State. The petition seems to apply to the case of the trustees alone, as it contains no statement that the plaintiffs in the other writ were citizens of Kentucky. In any view of the case, the petition was properly denied.

The motion for a continuance, so far as it was founded on the absence of a witness was properly overruled, because it does not show that the witness would have proved any thing advantageous to the party asking the continuance, nor does it state what he would prove; and it does not show a sufficient excuse for not having summoned him. He was, moreover, a co-plaintiff in one of the writs, and if present, could not have been made a witness without the consent of himself and co-plaintiff. True, he was a subscribing witness to the original will. But it was proved by two other subscribing witnesses. And not having been used as a witness in proving the will, the fact that he attested it could not give a right to make him a witness in his own case. But the other reasons are deemed sufficient to justify, in each case, the refusal of the continuance on account of his absence.

As to the absence of one of the counsel, who had been employed to contest the will, or the right of the plaintiffs in the writs of error. It cannot be admitted that when, as in this case, competent counsel practis-

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ing in the Court are present when a case is called in which they are engaged, the absence of a distant counsel, though caused by misfortune, is a conclusive ground for continuing the case. The question of continuance must, under such circumstances, rest in the sound discretion of the Judge, and we cannot say it was abused in the present case. Having thus traveled through all the decisions upon the various motions made in the Circuit Court, and found no error which should produce a reversal. We are of opinion that although upon putting the two records together, as presented in this Court, the first trial and judgment seem to present a sufficient objection to the record; yet as the proceedings in the first case were not introduced into the second, and as upon each record taken separately, it appears that the will was properly admitted to record as the will of James Taylor, deceased, which is the whole effect of both judgments, except as to the costs, we do not perceive that the plaintiffs in this Court were or are prejudiced by the two judgments except as to the costs. It appeared, indeed, from the will that Berry and Thornton, as trustees, had an interest in the will which authorized them to prosecute a writ of error, but the fact that they had in fact sued out one was only shown in the second case on the preliminary motion to dismiss the second writ. And even if it be supposed to be a part of the case on the trial under the second writ, or might be considered in determining the propriety of the judgment, there being no proof of the proceedings under it, we do not see that it was necessarily entitled to any effect in preventing a trial or upon the question of costs. We observe, also, that there is no assignment of error questioning the judgment for costs.

Then as in each case the will was fully proved, there seems to be no ground apparent in either record for reversing the judgment and orders therein. The judgment in each case is, therefore, affirmed. But as it appears to this Court upon the two records submitted and argued together that both judgments, so far as they reverse

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Bourne vs Wooldridge &c.

the judgment of the County Court and establish the will and order it to be admitted to record, are for the same thing, we think it proper, in order to avoid further anomaly and to prevent unnecessary costs, to direct in the mandate of affirmance that the will be recorded in the Circuit Court but once, and that there be but one mandate to the County Court.

Robertson and Harlan for plaintiffs; *Morehead & Stevenson, Robinson & Johnson and Loughborough* for plaintiffs.

Chancery. *Case* 123.

Bourne *vs* Wooldridge, &c.

Error to the Christian Circuit.

Set-off.

September 12. Judge Graham delivered the opinion of the Court.

The case stated.

On the 27th September, 1848, a note was executed by the defendants payable to Bourne or order for one hundred and twelve dollars, to be paid on the 25th December following. After its maturity an action of debt was brought upon it in the name of Bourne "for the use of himself and his partner in his business, S. H. Moseby, who sues for the benefit of Price & Gowan." The defendants filed a plea of set-off, in which they set up two notes for fifty dollars each, dated 11th of March, 1845, one due at one year and the other at three years from said date. That these notes were by the payee, Colglazer, assigned to Ford, and by Ford to the defendants in June 1848. They also charge a further indebtedness from Bourne to them for goods, &c., to the amount of $100, &c., and these several sums being due and unpaid, they offer to set-off, &c. To this plea the plaintiff filed a replication, which, in substance, alleges that Bourne & Moseby were partners in the business of cabinet work; that the defendants purchased from said firm cabinet work, commonly called household furniture, the property of the firm, which at the time of the purchase, sale, and delivery thereof, was known by

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the defendants to be the property of said firm, but by their contrivance, the note sued upon, was made payable to Bourne alone instead of being executed to the firm; that the plaintiff was ignorant of this fact until two months afterwards, when, after it had been passed to Price & Gowan in payment of a debt due to them from the firm of Bourne & Moseby, he discovered it was made payable to himself alone. To this replication the defendants demurred, and the Court having sustained the demurrer, the plaintiff has brought the case to this Court for revision.

The plaintiff's declaration omits a formal averment of promise, &c., but is, we think, sufficient in substance. The decision of the case must, therefore, turn upon the question of the sufficiency of the replication to the plea of set-off. If this note had been made payable to Bourne & Moseby, it could not, and we suppose would not, be insisted that the separate demands of the defendants subsisting against one only of the firm, could at law be plead as sets-off against the debt due to the firm. We need not cite authorities to sustain this proposition. But as the note is made payable to Bourne, and not to the firm, and the set-off, as plead, would be a good bar against him, in the absence of other facts, to avoid the off-set, are the facts relied on in the replication sufficient to avoid the effect of the plea?

A note was made payable to one of a firm for partnership property of the firm, and passed to a creditor of the firm, for whose benefit the suit was brought. Set-off plead of notes given by the payee of the note for his individual debt, and replication, setting out the fact that the note was by fraud or mistake made payable to one of the firm when it was given for partner-

It has heretofore been decided by this Court that in such case the plaintiff may reply that he is not the party beneficially interested in the demand in suit, and that others, for whose use the action was prosecuted, had an interest and equity in the demand for which suit was brought prior in time to the accrual of the demand plead as a set-off: (1 *Marsh.* 487; 3 *Mon.* 19.) In the case now before us it seems from the plea that the sets-off, or at least the notes plead, were the property of the plaintiff and accrued to him before the date of the note in suit, and if the debt, at the date or execution of the note, had been in fact the property of Bourne only, we suppose that no subsequent arrangement made by him, could have defeated their right to

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BOURNE &c. WOOLDRIDGE &c.

ship property, & should have been to the firm: Held that the replication was a valid answer to the plea on demurrer.

the set-off plead. Such, however, is not the state of fact presented by the replication. On the contrary it is expressly averred that the property (the sale of which constituted the consideration of the note) was the property of the firm of Bourne & Moseby, and that fact was known to the defendants, who, nevertheless, by their contrivance made the note payable to Bourne, who was ignorant of the manner in which the note was drawn until after it had been passed as a payment on a debt due to Price & Gowan, creditors of the firm of Bourne & Moseby.

One partner cannot without the consent of another appropriate the partnership property to his individual purposes: (16 *Johnson Rep.* 34: 9 *B. Mon.* 196.)

Suppose Bourne had not been ignorant, as he alleges, could he, without the consent of his partner, have used the firm property to pay his individual debt? It has been settled that one partner cannot without the consent of his co-partner thus appropriate the partnership effects: (*Dob* vs *Holsey*, 16 *Johnson's R.* 34; 9 *B. Mon.* 196.) The case now before us is stronger for the plaintiff than the one referred to from New York. Here there was neither an attempt or intention by Bourne to pay his individual debts by the appropriation of the firm effects. It may be said, and truly said, that it is somewhat singular he should not have known to whom the note was made payable; but it is equally remarkable that the defendants should have held in their hands demands amply sufficient to pay for the furniture bought by them, and yet withhold their demands and execute their note for the amount of their purchase. We will not, however, comment further on these suggestions. In any view which we have been able to take of the facts set forth in the replication, and which by the demurrer are assumed to be true, it seems to us that they were sufficient to avoid the plea, and that the demurrer to the replication ought to have been overruled.

The judgment of the Circuit Court is, therefore, reversed, and the cause remanded to that Court with directions to set aside the judgment, overrule the demurrer, and for other and further proceedings not inconsistent with this opinion.

B. & A. Monroe for plaintiffs; *Hewett* for defendants.

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Nelson's Heirs *vs* Lee.

CHANCERY.

ERROR TO THE BOYLE CIRCUIT.

Case 124.

Vendee and Vendor. Recission. Infant's real estate.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

September 26.

The case stated.

IN the year 1835 John R. Nelson, having title to several valuable tracts of land in the county of Mercer, (now Boyle,) departed this life under the age of twenty-one years, unmarried and without children, or father, mother, brother, or sister, or their descendants, but leaving paternal and maternal kindred, among whom, by the 7th and subsequent sections of the statute of descents of 1796, (*Stat. Law*, 563,) the inheritance descended in equal moieties—that is, one moiety to the paternal and one to the maternal kindred, in the course pointed out by the 8th section and other following sections. And their being on the side of the father no grandfather, but a grandmother, two uncles and an aunt, each of these was entitled, under the 8th and 9th sections, to an equal portion of one half of the estate, that is, each to one eighth of the whole. And on the mother's side there being neither grandfather nor grandmother, nor uncle, but one aunt, Mrs. Weisiger, and the children of a deceased aunt, Mrs. Edwards, the living aunt was entitled to one half of one moiety, that is one fourth of the whole; and the six children of the deceased aunt were entitled, collectively, to the same proportion. These children being infants, residing in the State of Illinois with their father, Cyrus Edwards, the Legislature of Kentucky by an act, approved January 21st 1837, authorized Cyrus Edwards, as natural guardian for his infant children, part of the heirs of John Reed Nelson, to file a bill against them in the Mercer Circuit Court, alleging certain facts, and authorized the Court, upon ascertaining the value of the lands, and if of opinion that the interests of the children would be promo-

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ted thereby, to appoint said Edwards commissioner to sell, &c., at public or private sale, and not below the value fixed by the Court, and at such credits as the Court shall direct, the proceeds to be invested in lands in the State of Illinois. A petition or bill was accordingly filed in the Mercer Circuit Court, and upon the report of commissioners, as directed by the act, the value of the land was fixed at $35 per acre, and the Court being of opinion that it would be advantageous to the infants to sell their interest in this land and invest the proceeds in lands in the State of Illinois, as alleged in this petition and provided for by the act of the Legislature, appointed Cyrus Edwards commissioner to sell the same publicly or privately for not less than $35 per acre, on a credit of one and two years, with interest from the date of sale.

Lee's contract of purchase.

In December, 1837, shortly after this decree was rendered, it appears that by consent of the other heirs and of Cyrus Edwards, acting by his agent, John Green, the entire interest of the heirs of John R. Nelson in two adjoining tracts of iand, the one of about 900 and the other of about 75 acres, and forming together one tract, was, upon due advertisement, offered for sale at public out cry. This proceeding was not regularly reported to the Court, nor is any precise account given of it in the record. But the result was probably embodied in an article of agreement executed on the 23d of December, 1837, a day or two after the public sale. This agreement recites the names of the grandmother, the two uncles, the husbands of the two living aunts, of John R. Nelson, and Cyrus Edwards, as parties of the first part, and George Lee of the second part, but does not describe the character or title of the first parties. It then states that the persons of the first part have sold to George Lee the tracts of land descended from John Reed Nelson, deceased, lying, &c., supposed to contain 975 acres, which constituted the plantation, &c. &c., to be paid for as follows: one third on the first day of Janaury next, (that is, January 1838,) or if not, negotiable notes, payble in thirty days, to be

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executed to each of the persons interested; one other third on the first of January, 1839, and the other third on the first of January, 1840—possession to be delivered the first of January, 1838, and the vendors were to have the land surveyed, and any excess or deficiency to be added to or deducted from the last payment. "The deeds to be made on or before the second payment, and the vendors may retain a lien," &c. The concluding sentence of the agreement is in the following words: "It is understood the said Edwards sells under the powers vested in him by a decree of the Mercer Circuit Court and subject to the ratification thereof, and the first payment to him is not to be made until the said Court shall approve the sale here made, but it is to bear interest until made."

The decree under which the commissioner sold, &c.

At the succeeding term of the Mercer Circuit Court, April 3d, 1838, an amended petition was filed stating more minutely the title and the situation of the three tracts of land referred to in the original petition, and without any notice of the intermediate proceedings, praying as before. Whereupon commissioners were directed to value the lands separately; and upon their reporting each tract to be worth $35 per acre, the Court on the 6th of April rendered a decree which set aside the former decree, "as no step has been taken under it," and appointing Cyrus Edwards commissioner to sell by private contract or public out cry, conforms in all respects to the first decree, except that it does not require that interest shall be paid from the date of the sale. Each decree directs that in case of a sale by public out cry, advertisements be made in a manner prescribed, and that the commissioner shall give to the purchaser a certificate entitling him to a conveyance when the purchase money (to be secured by bonds payable to him) is paid.

The act of 1843, confirming sale made by Edwards, through Green, as attorney, &c. in 1837.

Nothing further appears to have been done in Court until after the passage of an act, approved February 21st, 1843, to amend the former act. This amendatory act authorized the Mercer Circuit Court, upon a supplemental petition to be filed by Cyrus Edwards, to

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ratify and confirm, so far as his infant children are concerned, the contract of the 23d of December 1837, made for them by said Cyrus Edwards, acting by John Green, his attorney in fact, and other heirs of John R. Nelson, of the one part and George Lee of the other part, provided the Court should deem the same advantageous to said infants, and authorizing a conveyance of their titles. But the act provides, that it (the act) is in no wise to affect any equity which he may have in the premises. Under this act a supplemental petition was filed by Cyrus Edwards in the name of his children in April 1843. And upon affidavits taken, the Court being of opinion that the contract of December 1837 was advantageous to them, a decree was rendered at the same term confirming the sale and authorizing a conveyance, stating the amount of purchase money received for them and retaining a lien for the residue, which deed was required to be made on or before the first day of the next regular term. At the succeeding regular term, (on the 6th of October, 1843,) a rule was made, on the petition of Lee, that Edwards show cause at the next April term why said Lee should not be made a party. No further proceedings seems to have been had in the case, which must be regarded as still pending.

The filing of the bill in this case April, 1845, by Nelson's heirs for specific performance of the contract of sale to Lee.

But in April 1845 the heirs of John R. Nelson, including the infant children of Cyrus Edwards, who sue by him as their next friend, filed their bill against Lee asking for a specific execution of the contract of December 23d, 1837, averring their ability and readiness to fulfil it on their part, their desire at all times to do so, and the tender at different times of separate deeds from the heirs except the children of Edwards; and as to them, it sets forth the proceedings on the petition, as above recited, and avers that Cyrus Edwards delivered a certificate of purchase to Lee in 1838, and that under the decree on the supplemental petition in 1843, he tendered a deed conveying the title, which he refused, &c. It admits the receipt of the first instalment of the purchase money by all of the heirs, including

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that payable for the interest of the children of Edwards, and also a part of the second instalment, which, not having been fully paid or tendered, the complainants insist that they have not been in default in making the conveyance. They offer to perfect the deeds before tendered if they should be deemed defective, and insisting that they had a right to convey their respective interests by separate deeds, consent that the Court may decree a joint conveyance by a commissioner.

Lee's answer & cross bill, Nov. 1845.

In November 1845 Lee filed his answer, which he made a cross bill, praying for a recission of the contract. He says, in effect, that when bidding for the land, he supposed the whole was sold under a decree, but was afterwards informed that the interest of the children of Edwards alone was so sold, and that the interest of the other heirs was sold by their consent; that the agreement of December 23d, 1837, was executed by some of the parties of the first part in person, and by agents for others, and he does not know that they were authorized. Cyrus Edwards was not present at the sale; that the agreement was delivered to him, and he held it as the only evidence of his purchase; that he received the possession, as stated in the bill, and has paid, at different times, at least $21,871 50 of the purchase money, believing, while he was making said payments, that the contract would be carried out, &c. But that shortly afterwards he learned that a mortgage on the land, executed by the former proprietors, Davis and George Caldwell, &c., had been foreclosed in the Mercer Circuit Court for a large amount; and while examining the records to ascertain this fact, he also looked into the petition suit of Edwards, and to his surprise, found that his purchase had not been reported—that a decree had been rendered for another sale, under which nothing was done—and that upon advice taken, the decree and all the proceedings were understood to be void. The statute had not been complied with—the children of Edwards had not been made parties—and he was informed that Anne K. Nelson, (paternal grandmother of John R. Nelson,) named as a

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party to the agreement of sale, had previously conveyed her interest to Jeter Hicks (who was also a party)—that under these circumstances he determined to abandon the contract; and, although he still holds the land in possession, he has done so, regarding it as an indemnity for his payments, which he expected would have to be principally reimbursed in that way. "The complainants, he thinks, were soon after apprised of his determination." He does not admit the heirship of the complainants, as alleged, nor that they have title, &c., but says their title is defective and incumbered, and calls for their title papers and for proof of their right to convey; charges that they have been negligent in complying with their part of the contract, and that on that ground alone, a specific execution should be denied to them. He admits the tender of separate conveyances by some of them, which he refused to accept, on the ground that by the contract he was entitled to a joint deed and joint warranty, and he was not and is not willing to waive this right or to change the contract. He avers that when he became acquainted with the state of the title and of the proceedings, &c., and ever since he made it known in conversations—and it was known to the complainants that he had determined to cancel the contract—that so far as Edwards was concerned, he considered it as already cancelled by the proceedings in the suit, (petition,) and he was unwilling to take a conveyance from the other heirs alone. He objects to the deeds tendered, because they are the separate deeds of the heirs, and objects also to a joint deed by commissioner, as proposed; and he admits his refusal of a deed tendered by Edwards under the decree on the supplemental petition. He says he was not aware, when he purchased, that there was any want of conformity between the sale and the decree; nor was he notified of the subsequent proceedings; that he is ignorant why the sale was not reported, and why it was stated of record that no sale had been made. He admits that a paper, purporting to be a certificate of purchase from Edwards alone, was tendered to him late in

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the year 1838, which he refused to accept as a part of the contract, because it did not correspond with the written agreement, and was untrue in its statements, but that he retained it to compare it with said agreement, and he refers to it as filed with his answer. In addition to the objection made to the proceedings under the statute, referred to in the bill, he insists that as Edwards and his children were and are residents of the State of Illinois and not citizens of Kentucky, the Legislature of Kentucky could not authorize the transfer of the title of the infant children—that the supplemental proceedings are void, and that if valid the title is not such as by his contract he is bound to accept.

The decree of the Circuit Court rescinding the contract of purchase.

Upon final hearing, the Court, in conformity with the views and under the prayer of the defendant Lee, decreed a recission of the contract of sale, and directed proceedings for ascertaining the equities of the parties consequent upon the recission, and decreed that the complainants pay the costs of Lee upon the original and cross-bills. To reverse this decree, the complainants have brought the case to this Court, and the two principal questions presented are, fiirst, whether the complainants have such title as the defendant should have been decreed to accept, or such as should have prevented a recission of the contract; and, second, whether there was and is an enforcible contract between the parties.

Where suit had been brought to foreclose a mortgage, & dismiss'd for want of prosecution, & that dismissal long acquiesced in, the presumption arises that the mortgage was paid off.

First, as to title in the complainants. It is proved that they are the heirs of John Reed Nelson, who, as the heir of his father, Samuel K. Nelson, and of his infant sister and co-heir, deceased, inherited and owned at his death, such title as his father held in the entire tract of 975 acres. Mrs. Ann K. Nelson's interest either passed by her deed, or descended to her heirs, who are complainants. The title to 900 acres, derived by purchase through the Caldwells, appears to be perfect, except so far as it may be encumbered by the mortgage and proceedings thereon, referred to in the answer and cross-bill of Lee. From these proceedings, which are made a part of the record before us, it ap-

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pears that after the mortgagees had, with great zeal and pertinacity, pursued their remedies for foreclosure for many years, after several decrees had been rendered, preparatory to a sale of the land, for the satisfaction of several large debts, ascertained to have liens upon it under the mortgage, and when the fruits of a long and expensive litigation seemed to be just within their grasp, the entire suit was dismissed (several years before the present bill was filed) for want of prosecution. The natural and only rational presumption is, that when it was determined that the land was subject to the demands claimed to be secured by the mortgage, the debts were paid, or otherwise arranged so as to leave the land free from encumbrance; and if it might have been improvident to decree a specific execution on the ground of this presumption alone, we think it certainly would have been improvident, in the absence of any rebutting circumstances, to decree a recission on the ground of a continued encumbrance by the mortgage. It might be prudent, in such a case, to direct an enquiry, by the master, to ascertain the condition of the mortgage claim, which, even if not extinguished, might be actually within the amount of purchase money remaining unpaid, and therefore not of itself sufficient to authorize a recission or to prevent an enforcement of the contract of sale. But a long acquiescence in the dismissal of the suit on the mortgage would seem to authorize the assumption that the encumbrance no longer existed.

Before the statute authorizing the sale of infants land devised, land descended was sold and conveyed by decree of the chancellor, the price received by the infants at full age, and the sale acquiesced in for 25 years: Held that the title was valid. One of the devisees being a

With respect to the 75 acres, constituting a distinct part of the 975 acre tract, no particular allegation nor specific objection is made in the pleadings. It appears however, from a record filed in this case and read on the trial, that in December 1825, the 75 acres were purchased by Samuel K. Nelson at a decretal sale upon the petition of two infant children and devisees of David Knox, by their guardian, and that a conveyance, by commissioner, was shortly afterwards made to him and approved by the Court. There is no objection to the title of Knox, which seems to be indisputa-

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feme covert, and having interest of 143d part not conveyed—a purchaser might ask an abatement to that extent.

ble. The objection is that this land did not descend to the heirs of Knox, but was devised to them, as appears by his will; at the date of this petition and sale there was no authority in the Courts to decree a sale of land on such a petition unless it had descended. But this objection, however well founded in principle, is, to a great extent if not wholly, obviated by the fact that the proceeding was assented to and authorized by most of the heirs besides the petitioners—that several of them answered, and some of them made purchases under the decree—that all received their portions of the proceeds of this land, and that all have acquiesced in the sale made about twenty-five years ago. One and but of the eleven children, &c., heirs of Knox was a female then and still under coverture, she, therefore, may not be estopped or otherwise barred. But we are of opinion that, under the circumstances stated, the assent and authority of the other ten heirs must be presumed, and that after so great a lapse of time they are precluded from the operation of any right in opposition to the sale. The interest of the *feme covert*, Mrs. Caldwell, in the 75 acres, being only about six acres and eight tenths, and less than the one hundred and forty-third part of the 975 acres embraced in the contract, its actual loss would not be a proper ground either for rescinding the contract, or refusing a specific performance. But, in the abscence of any conveyance from her, their might either be a rateable abatement in the price, or some other provision for the indemnity of Lee against any claim on her part.

Second. As under the foregoing views the decree cannot be sustained on the ground of a defect of title in the complainants, we proceed to consider the question whether on the facts stated there was and is any enforcible contract between the parties. In entering upon this branch of the subject, it is to be recollected that the written articles, signed by the parties, discriminates between the apparent vendors and their interests by stating that Cyrus Edwards was selling not for himself, but under a decree and subject to the rati-

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fication, and of course to the disaffirmance of his acts by the Court, and the first payment to him was to be postponed until the sale should be approved. Lee knew he was purchasing from Edwards the interest of his infant children, and that his purchase was, to this extent, subject to the future action of the Court. It was his duty to know what the decree was, and to notice the future proceedings by which his interest and duty were to be affected. Then, although Edwards appears in the first part of the instrument as a joint vendor, or with the others, does not the last clause show that, as to him and the interest which he was disposing of, that the sale was distinctly made in a special character, subject to special contingencies, and requiring special provisions, applicable as between him and Lee alone, and which might separate the mutual performance of the contract, as between them, from its performance, as between Lee and the other vendors? Edwards was not entitled to demand any payment until the ratification of his sale. But there was no condition to the right of the other vendors to have the first payment, and no condition as to the other payments but the general condition applicable to all, that the deeds should be made on or before the second payment. And we remark that the word deeds, in the plural, (for such it appears to be both in the transcript and in the original papers,) demonstrates that the execution of the contract, on the part of the vendors, was not necessarily to be one joint act, and thus authorises the conclusion, not only that Edwards might, but that in reference to his character as commissioner, it was expected that he would convey by separate deeds.

Assuming that under the joint terms of sale, contained in the first part of the writing, all the vendors were bound for the conveyance of the title to the entire tract, it does not follow that they were bound for a joint conveyance by one deed, or that the conveyance of the entire tract, or the ability to convey it, was a condition precedent affecting the entire right of execu-

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ting and enforcing execution of the contract. And under the discrimination made, with reference to the interest sold by Edwards, we are inclined to the opinion that there was a binding contract enforcible as to the other interests, amounting to three-fourths of the land, independently of the ability of Edwards to convey the fourth part sold by him; and that although by subsequent events he should be entirely unable to do so, the residue of the sale might be enforced, unless it appeared that there was some unfairness or imposition in the transaction, or that the acquisition of the interest which Edwards assumed to sell was so material an inducement to the purchase, that the enforcement of the contract, as to the residue upon the stipulated terms, would be an evident hardship and injustice, and that the loss of this particular interest could not be reasonably compensated in damages.

It is true all the vendors have been bound for what is implied in the statement that Edwards sells under the powers vested in him by a decree and subject to ratification. And under this implication they may have undertaken that the sale by Edwards, which was in fact made under the powers conferred by the decree, was such as was capable of ratification by the Court. But it cannot be supposed that they undertook that the sale was in exact conformity with the decree under which it was made, since the discrepancy, with respect to the terms of payment, was apparent. They could not have been bound by this statement further than that the sale was susceptible of ratification. They did not by this clause undertake that the sale should or would be ratified. And the most unfavorable construction to the vendors that can be put upon the entire article, is, that if the sale by Edwards was not susceptible of confirmation or ratification by the Court—that is, if it was absolutely void either for want of conformity with the decree, or for want of power in the Court to authorize or confirm it, this defect vitiated the entire sale and rendered the whole either absolutely void, or at least voidable at the option of the vendee.

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If this sale by Edwards were thus void, there was of course no enforcible contract to that extent, and any subsequent proceedings to which Lee was not a party, could not make a contract binding on him. But if the sale was not void, but was susceptible of ratification, its subsequent ratification by the competent tribunal was binding on Lee, who bought knowing that the sale required such ratification—who had opportunity of knowing the proceedings taken for procuring it, and who cannot resist the enforcement even of this portion of the contract on account of the tardiness and indirectness of these proceedings, unless he shows that he was injured thereby, or that the delay was caused by a desire to profit by contingencies, which might make the sale desirable or otherwise, and, in fact, that there was what is called a trifling with the contract. Nothing of this sort being shown, it is not necessary to decide how far the residue of the contract and the other vendors might have been affected by such facts had they existed. Whether, if the sale by Edwards had been absolutely void, the residue of the sale would also have been *ipso facto* void, is, to say the least, exceedingly doubtful. But as this question arises only upon the assumption that the sale by Edwards was void, we do not decide it, but pass to the question on the sale by Edwards.

The general power of the Legislature to authorize decrees by the Courts for the sale of infants estate has been too long practiced & acquiesced in to be now questioned.

The general power of the Legislature to authorize the sale of the land of infants, through the agency of a Court or judicial tribunal is admitted in argument, and cannot at this day be questioned. It has not only been long exercised, but many titles derived under such sales have passed through and been held valid by this Court, and numerous estates comprising vast quantities of land have been acquired and are held under this joint sanction of the legislative and judicial departments. If the power were originally questionable, it is now too late to question it. The disabilities of infants and the powers of guardians over their estates, are matters of legislative regulation. The actual disability and impotency of infants of tender years to take care either of

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themselves or their estates, subjects, necessarily, both themselves and their property, to some extent, to the care and power of others, and thus the whole subject is brought within the proper sphere of regulation by the public authority, which, from the necessity of the case, must be competent to determine the rights both of infants and their guardians. And as there may be emergencies which require the exercise of the same power over an infant's property which an adult may exercise over his own, it would seem that the legislative authority should be competent, both to determine the nature of the emergency which would require such acts on the part or in behalf of the infants, and to invest either the infants themselves or some other person or tribunal with the power of performing them. We perceive no ground for limiting this public authority to the personal estate of infants, although the difference between the different sorts of property furnishes a proper ground for caution, and for discriminating between the emergencies which may be deemed sufficient for the exercise of the power with respect to the one or the other species.

The Legislature of Kentucky have the power to authorize the Courts to decree the sale of the land of non-resident infants, & of residents—our statutes apply to both.

Then is there any ground for discriminating between the legislative authority over the lands of infants, on the ground of the owners being or not being residents of the State? It is true the persons of the non-resident infants are not within the jurisdiction of the State, and the powers and duties consequent upon their personal presence do not attach. But their lands are here, subject to the jurisdiction of this State and of no other, and the interests of the non-resident owners in these lands is subject to the jurisdiction of this State, which is bound to protect those interests, and which in the case of non-resident infants, does protect them by authorizing the appointment of guardians to preserve and control their lands within the State. The same emergencies may exist in the case of non-resident as of resident infants, requiring the exercise of the same power over their estates, to be exercised either by themselves or by others for them. And, although, as the Legisla-

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ture is not so directly bound to regard their personal comfort and convenience or advantage as if they were residents, it might refuse altogether to confer the powers ncessary for their advancemet, we do not perceive that the fact of non-residency diminishes the power of the Legislature or the public over their estate situated within this Commonwealth. If it were even conceded that the persons of the non-resident infants being out of this jurisdiction, the Legislature could not confer on them a personal power of selling their lands here before attaining full age, as fixed by the general laws, which we do not decide, it would by no means follow that the guardians of non-resident infants might not be invested with the same powers over their lands situated here, as are conferred upon the guardians of resident infants, to be exercised in the same emergencies and under the same restrictions. On the contrary, we are not only satisfied that this may be done, but we are further of opinion, that the fact that the infant owner of lands within this Commonwealth is a resident of a distant State, may constitute a sufficient and proper ground for conferring the power of selling his lands here, if desired by those who may be safely recognized as the guardians of his interest, and under proper cautions for its ascertainment and security. Our general statutes authorizing the sale of infants' lands, on the petition of their guardian, makes no discrimination between resident and non-resident infants, and, as we presume, was intended to apply to both. The constitutionality of these statutes, if even questioned, is well established. Under them a sale upon petition by the father, as natural guardian, has been sustained by this Court, but since the enactment of the particular statute now in question: *McKee's heirs* vs *Hann, &c.*, (9 *Dana*, 526.) And whether the fact of the infant owners being non-residents or about to become so, might or might not be regarded, even under the general statute, as a proper ground for decreeing a sale, we do not doubt that the Legislature may make it a sufficient ground for the action of the Courts. And although the general statutes

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may contemplate a public sale and not a private sale under the decree, this is a matter of expediency and prudence, certainly within the power of the Legislature, if not within the discretion of the Courts under the general statutes.

We conclude, therefore, that the statute authorizing the original proceeding by Cyrus Edwards, as father and natural guardian of his children, is constitutional and valid. And as we are of opinion that the power thereby conferred on the Mercer Circuit Court was not exhausted by the first decree of sale, but that the Court, upon being satisfied that a sale could not be made on the terms decreed and that the land was not worth so much, might either have confirmed the sale under the first decree, although somewhat variant from it, or might have decreed a second sale, we cannot regard the actual sale as being void. But as it was made fairly and publicly upon general notice, and the attendance of bidders, and was, moreover, concurred in by the adult owners of three-fourths of the land sold, and evidenced by written articles signed by the parties, we think there was sufficient evidence that it was an advantageous sale, and sufficient ground for its confirmation, if the facts had been reported to the Court as they should have been. There was, therefore, a sale and contract for the whole tract, not void as to any part, and which, although voidable, ought not to have been, and as we must presume would not have been, avoided or disaffirmed by the Court. Under this contract Lee, as well as the vendors, acquired rights which ought not to have been disregarded. He might, as purchaser, have compelled a report or certificate of the sale, and we assume that the Court would have protected his interest, if properly presented, and would have authorized and enforced a completion of the sale upon the terms on which it was made.

It was competent for the Legislature to pass a law authorizing the guardian of non-resident infants to petition,

It is argued, that as the statute authorized Edwards to file a bill against his infant children, stating the facts, it was intended by the Legislature that they should be proceeded against in the usual manner of suits against

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and a Court of Chancery to decree the sale of the land of such infants without process against the infants.

non-resident infants by warning order, and traverse or answer by guardian *ad litem*. But the jurisdiction of the Court and its power to decree a sale, did not depend upon these formalities, but upon the filing of the bill or petition by Edwards, as father and natural guardian, against his children, and stating the fact of their residence in Illinois which is undisputed, and that it would be for their interest to invest in that State the price or proceeds of their lands here, as to which, the Court was to form its own opinion upon the report of commissioners. A formal denial of either of these facts could have produced no other effect than a little additional expense and delay. And if the omission of the steps referred to may have rendered the proceeding erroneous, it did not, in our opinion, render it void, as was in effect decided in the case of *Gates, &c.* vs *Kennedy*, (3 *B. Mon.* 167,) under the general statute of 1836, authorizing the sale of lands devised to infants, and which required them to be made parties. We suppose the Legislature did not contemplate nor intend to provide for a controversy between Edwards and his children with regard to what would be advantageous to the latter, but intended to confer a power upon him under the direction and judgment of the Court, to act for them in the case provided for. The proceeding was, doubtless, intended to be modeled, substantially, upon that authorized by the general statutes, and we think no particular stress is to be laid upon the words "bill against his children," as intended to vary the proceeding, substantially, from that by petition under the general statute. It may have been intended to give the children the right of appeal, &c., as formal parties, but not as, we think, to make the power of sale depend upon the form of proceeding, after filing the bill, which gave jurisdiction of the case. And, as in the case of *Gates* vs *Kennedy*, *supra*, the present bill filed by the children of Edwards with other vendors, while the proceedings on the former bill were still pending and incomplete, may be considered as causing whatever irregularity there was, in not proceeding formally against

Infants whose lands have been sold by a decree of the Chancellor under a statute may, on arriving at full age, waive an irregularity as to themselves, and insist upon a specific performance by the purchaser.

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them as defendants to the first bill, as well as other informalities, and especially, as during the pendency of the present bill, several of them have become adults, and all insist on the completion of the sale.

Under any view of this objection it does not, in our opinion, prove the sale to have been void, but leaves it subject to confirmation or disaffirmance by the Court. And as it was in fact afterwards confirmed by the Court before the present bill was filed, and is prayed to be carried into effect by all of the vendors, who, whether infants or adults, would be bound by a decree granting their prayer; and as the vendee has remained in quiet and undisturbed possession during the long interval of thirteen or fourteen years since the sale, taking no step himself for having it acted on by the Court until he filed his answer in this case, and suffering no injury from the delay, the only remaining questions seem to be whether the sale was, at any time, by disaffirmance or other act of the Court actually nullified, so as to be no longer capable of confirmation, or whether it was so treated by the other parties as to preclude them from enforcing it against Lee.

It is not alleged that there was any other disaffirmance by the Court but such as is implied in the second decree, which set aside the first and directed a sale, reciting that there had been none. But there was nothing done under the second decree. It might at any time have been set aside or disregarded. And neither the purchase under the first, nor the infant children, for whom the sale was made, could be deprived of their rights by this indirect assertion of a fact which did not exist. The sale under the first decree, not having been brought before the Court, there was no decision against its validity; and the second decree showing that the fact of a sale having been made was not known to the Court, presented no obstacle to its confirmation, and, especially, so long as nothing was done to create a counter interest under the second decree.

With regard to the motives or purpose of Edwards, or those who were controlling the proceedings for him,

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NELSON'S HEIRS vs LEE.

we think there can be little doubt. There is not the slightest ground for supposing that any of the vendors desired or intended to defeat the sale to Lee, which they seem in every act unless it be the second decree, to have desired to carry out. And we might infer that it was intended in the form of a sale, under the second decree, to give effect to the sale actually made under the first, and that the certificate of sale sent by Edwards to Lee, was intended to evidence such second sale, though it dates the sale a few days before the decree. That it was not intended to disregard the actual sale, and sell the land again, is evident from the fact that, although the second decree directed a sale, none was attempted. And we regard this intermediate proceeding as an awkward effort to cure the discrepancy between the first decree and the sale made under it, which, as it produced no real injury except that of delay and embarrassment to the vendors, is entitled to no effect upon the the question of recission or specific execution.

It was certainly the duty of the vendors, or at least of Edwards, to have had the sale confirmed in reasonable time, but Lee having remained in the enjoyment of the land, having, as we understand the facts, continued to make payments after the time when the second instalment was to have been paid, and the deeds made, and not having made known any objection to the fulfilment of the contract, until some indefinite period afterwards, and the confirmatory act and decree having been obtained before he took any formal steps for rescinding the contract, we are of opinion that he cannot rely upon the mere delay in confirming the sale, and that having sustained no injury by it, he should be compelled to perform his part of the contract by payment of the balance of the purchase money, (due for the full quantity of the land which should be ascertained or agreed on,) except so far as his duty, in that respect, may, upon the principles formerly stated in this opinion, be affected by the mortgage, above referred to, or by the want of title, as to the interest of Mrs. Caldwell in the 75 acres claimed by the complainants as de-

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rived from Knox, as to which, proper provision for his security may be made in the decree. And as the complainants have offered to execute a joint deed by a commissioner under the decree of the Court, such a deed should be decreed accordingly, in addition to which, Lee should be permitted to accept the deed tendered by Edwards under the confirmatory decree, and also such of the other deeds tendered by the other parties, respectively, as he may choose to take, conceiving as we do, that the Court had power without the confirmatory statute to confirm the sale, we have not deemed it necessary to comment upon that statute.

Wherefore, the decree is reversed, and the cause remanded for a decree as above indicated.

Harlan and Bell for plaintiffs; *Fox and Kincaid* for defendant.

ERRATA.

On page 284—21 lines from the top, for "*surrender*," read "sum due."

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INDEX.

ABATEMENT.

1. In suits against heirs, it is proper to abate as to such as are not inhabitants or not found, as in cases of proceedings against joint and several obligors. *Litsey and wife* vs *Smith's adm'r*, 74.
2. Though a party die pending a suit, it is still a pending suit until an abatement be entered. *Cook's ex'ors* vs *Turpin*, &c. 245.
3. Though a party to a suit die, it is still a pending suit until an abatement be entered. *Ibid*, 245.

ABATEMENT.

See Attachments in Chancery.

ACTION.

1. When a statute gives an action, though debt is most usually brought, yet if the statute prescribe no form of remedy, assumpsit will lie. (1 *Chitty*, 120; *Butler's N. P.* 129.) *Elliott* vs *Gibson*, 439.

ACTION ON THE CASE.

1. The malicious and wrongful *continuance* of an injunction *might* be a ground of action, though the action for its wrongful and malicious obtention might be barred by lapse of time. Argu. *Cox* vs *Taylor's adm'r*, 17.

ACTIONS JOINT OR SEVERAL.

1. When by one deed several grant their respective interest, and each warrants the interest granted, each are liable *separately*, not jointly, upon the covenant of warranty to the extent of the warranty of the part conveyed. *Evans* vs *Sanders*, &c. 292.

ADMINISTRATION.

1. If an administrator pay debts in full to a portion of the creditors of the intestate, and upon a *pro rata* distribution of the remainder of the assets there should be a deficit, and the administrator compelled to pay to other creditors a portion of the amount so paid to those who received the full amount of their claims, he cannot recover it back. *Lawson's adm'rs*, vs *Hansborough*, &c. 148.

AGENT.

1. Though generally one receiving bonds and notes as collateral security, is bound to use reasonable dilligence to collect, and if they are lost by neglect, the receiver is chargeable; this rule does not apply to a case where the receipt of a lawyer of another State, for notes there due, is received by one as trustee in Kentucky to be received, and by which receipt the lawyer was bound to collect and remit. It could not be expected he would travel to another State to pursue the lawyer. *Noland* vs *Clark*, 241.
2. The contract of an agent, within the scope of his authority, is binding upon his principal, although made in the name of the agent, if it be subsequently re-

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AGENT—*Continued.*

cognized by the principal; and although the principal was not in fact trusted at the time of the contract. (*Chitty on Con., last ed., page* 224, *note* 3; *Paley on Agency*, 248–9.) *Violet* vs *Powell's adm'r*, 349.

But if the vendor knows who is the principal, but gives credit to the agent instead of the principal, the rule is different. The principal cannot deprive the other contracting party of any equity—set-off, &c.—against the agent where he lies back and his name and credit is not considered or known in the contract. (*Paley on Agency*, 326-7-8.) *Ibid.*

APPEAL.

1. Praying an appeal, and the grant thereof, does not have the effect of suspending the execution of the decree during the time given by the Court for the execution of the appeal bond. (1 *J. J. Marsh.* 193.) *Bank of Kentucky* vs *Vanmeter*, 68.
2. An appeal or writ of error lies to a judgment by which there is a conviction for an offence, the punishment of which is fine or fine an imprisonment, (3 *Stat. Law*, 37,) act of 1841. *Hayden* vs *Commonwealth*, 125.

APPEALS TO THE COUNTY COURT.

1. The Court of Appeals has no jurisdiction to revise a judgment of the County Court *affirming* or *reversing* the judgment of a Justice of the Peace; but it may reverse a judgment of such Court refusing to entertain jurisdiction of such appeal and improperly adjudging tobacco and costs against appellant. *Waggenner* vs *Highbaugh*, 198.

APPEALS FROM JUSTICES.

1. An appeal lies from the judgment of Justices of the Peace in case of trespass and trespass on the case (a jurisdiction conferred in 1840) to the Circuit Courts. *Waggener* vs *Highbaugh*, 197.
2. Where an appeal is dismissed by the County Court, because it was improperly taken to that Court, but should have been to the Circuit Court, no judgment should be given against appellant for tobacco. *Ibid.*

APPEALS AND WRITS OF ERROR.

1. Though no appeal or writ of error lies to the Court of Appeals from the judgment of the County Court, *affirming* or *reversing* the judgment of the Justice under £5, (1 *Stat. Law*, 133,) yet this Court will reverse when the County Court, having jurisdiction, refuse to exercise it and dismiss the case. *Ante*, 193. *Evans* vs *Sanders*, *&c.* 292.

ASSETS.

1. The personal estate is the primary fund for the payment of debts, but a creditor who has a judgment against the personal representative, and a return of *nulla bona*, may proceed aguinst the real estate in the hands of the heir or devisee, and is not bound to investigate the correctness of the administration. *Litsey and wife* vs *Smith's adm'r*, 77.

ASSIGNEE AND ASSIGNOR.

1. The assignee of a note who has accepted the provisions of a deed of trust made by the debtor to satisfy all his creditors, has no recourse against the assignor on account of the supposed insolvency of the obligor at the date of the assign-

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ASSIGNEE AND ASSIGNOR—*Continued.*

ment, nor any right to claim a set-off against the assignor until the trust fund has been exhausted. *Duncan* vs *Monserrat, &c.* 93.

2. An obligor claiming a set-off or equity of a demand against the assignor of his note, because of the insolvency of the latter, must aver and prove insolvency before notice of the assignment. *Ibid.*
3. An asignee has no right of action against a remote assignor, nor can he maintain a suit against any but his immediate assignor—though if he have cause of action against his immediate assignor, he may use his name in a suit against the assignor of his immediate assignor. *Mardis* vs *Tyler*, 378.
4. The assignment of one of two joint assignees to his co-assignee, does not give a legal right of action to the latter. Otherwise if the assignment be by both assignees to one of them. Argu. *Ibid.*
5. That an executor assigned notes as executor in discharge of a debt for which he was personally liable, did not exonerate him from a personal responsibility on the assignment in case the obligors failed after due dilligence by assignee. *Cross* vs *Petree*, 414.
6. T sold property to Mc. took notes reserving a lien for the price—assigned the notes to V and M. V assigned to M. T took a mortgage on the property sold, and all the other property of Mc. M foreclosed the mortgage and brought assumpsit against T, not having prosecuted any suit against Mc., avering that T, in consideration of his liability as assignor, had promised to pay the balance unpaid of the notes assigned, so soon as the mortgaged property was disposed of. Held, that there being a moral obligation on the part of T to pay, it was not necessary to aver more than the express promise of T to pay on that contingency, and that the property had been disposed of, &c. *Mardis* vs *Tyler*, 379.

ASSIGNEE IN BANKRUPTCY.

See Parties in Chancery.

ASSUMPSIT.

1. In assumpsit it is most consistent in modern practice to complain in a plea of trespass on the case *on promises*, but it is not cause of demurrer that the words *on promises* is not added. Trespass on the case includes assumpsit as well as causes of action in form *ex delicto*. (1 *Chit.* 151.) *Albirt's ex.* vs *Blue*, 92.

See Action, 1.
2. One, who at the request of another, who has lost money at unlawful gaming, pays it for him, may recover it back in assumpsit, though he may have known that it was to pay a gaming debt. *Eaglish* vs *Young*, 142.
3. May be maintained for rent when the premises have been enjoyed at a stipulated price. *Burnham* vs *Best*, 227.
4. That there was a special contract will not prevent the landlord from recovering on the general count in assumpsit, if the premises have been enjoyed. *Ibid*, 228.
5. When the renting was by one of several heirs, the others may, in such action, recover their proportion of the entire value of the use, as agreed upon. *Ibid.*
6. May be maintained for rent payable in money where the term has been enjoyed, though under a special contract. *Burnham* vs *Best*, 228-9.
7. If a party make a promise to pay when there exists a moral obligation which he might have waived, he will be bound to perform. (*Kent Com.*, 5 *ed.*, 113; *Chit. on Con.* 47, *v.* 3; *Bank of Ky.* vs *Ray*, 3 *B. Mon.* 510, which is not inconsistent with *Ralleton* vs *Bullitt*, 3 *Bibb*, 102.) *Mardis* vs *Tuylor*, 382.

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ASSUMPSIT— *Continued.*

8. No action of assumpsit lies to recover money paid to the use of another, unless upon request or in discharge of a legal liability. *Oden* vs *Elliots's ex'or*, 315.

ATTACHMENTS IN CHANCERY.

1. Property which has been attached by a creditor is still liable to sale under execution, but the purchaser takes it subject to the lien acquired by the attaching creditor. (3 *B. Mon.* 133; *Ibid*, 580.) *Bell* vs *Barclay & Bryant*, 263.
2. Two attachments in chancery may be prosecuted at the same time in different counties to subject different articles of property of the defendant to the satisfaction of the same demand, when the first levy was insufficient. *Savary* vs *Taylor*, 334.
3. Though the general rule be that one suit in chancery may be relied upon to abate another for the same object. (3 *Dana*, 335.) *Ibid.*

ATTORNEYS' FEES.

1. The County Court attorney has no right to a taxed fee in proceedings against guardians for failing to return inventory, &c., (1 *Stat. Laws*, 169,)—he has fees in certain cases. (2 *Stat. Law*, 1382.) *Commonwealth* vs *Shanks*, 305.

AWARD.

1. It is erroneous to enter judgment upon an award at the term at which it is returned, unless the parties have been furnished with copies thereof, or their is a waiver of this requisition. (4 *J. J. Marsh.* 227; 2 *Bibb*, 159.) *Adams* vs *Hammon*, 9.
2. A submission to two and their umpire, and award by all is valid. (3 *Burn.* 1474; 1 *Black's Rep.* 463.)

There is no difference in the submission to two and their umpire, and to two and their umpire, in case of disagreement. (1 *Bac.* 211, *let. D*; *Hard.* 431.) *Tyler* vs *Webb*, 133.

BANKRUPTS.

1. The promise of a discharged bankrupt to pay a note given before the bankruptcy, does not revive the right of action on the note: (8 *B. Mon.* 7; 9 *Ibid* 44.) *Carson* vs *Osborn*, 155.
2. An assignee in bankruptcy, though a party to a suit in chancery between a creditor and the bankrupt, is not barred of his right as assignee where he does not assert it, and it is not adjudicated upon. *Botts, &c.* vs *Patton, &c.* 456.

See Parties in Chancery.

BAR.

1. The legal effect of dismissing a suit *agreed* is to bar any other action for the same cause: (4 *Dana* 395.) *Jarboe* vs *Smith*, 257.
2. The parties dismissed their suit by entering upon the record that it was *dismissed agreed*, and agreed to submit the controversy to arbitrators; the arbitrators met, but could not agree upon an award—Held that the original cause of action was merged, and no suit could be maintained upon it. *Ibid* 258.

BILLS OF EXCEPTIONS.

1. The Court of Appeals disapprove of the practice of preparing bills of exceptions in vacation, but in this case held the parties to their agreement that it should be so done—no unfairness appearing. *Kelsoe* vs *Ellis*, 37.

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BILLS OF EXCHANGE.

1. The protest of a domestic bill of exchange is not required by law, nor is the certificate of a notary public of the protest of such bill evidence of itself of dishonor. *Bank U. S.* vs *Leathers*, 65.

BILLS OF REVIEW.

1. The leave of the Court is not necessary to be had to authorize the filing of a bill of review, where the error appears upon the face of the decree. *Berry* vs *Stockwell, &c.* 301.
2. A bill to set aside a decree for fraud, is not properly a bill of review, and no leave of the Court is necessary to authorize a party to file such a bill. *Botts, &c.* vs *Patton, &c.* 456.
3. A bill of review may be such as to authorize the relief prayed for, yet if the grounds for filing the bill were not sufficient, the relief cannot be given—the former decree being a bar. *Carter* vs *Stennet and Eason*, 251.
4. That a party discovered during the term that a part of the exhibits had been lost out of the papers, and that on that account the decree had been against him—should have been made known at the term by a petition for re-hearing or suspension of the decree to give time for such petition. It was no ground for a bill of review after the Court had adjourned, that the party *himself* was ignorant of this fact. *Carter* vs *Stennet and Eason*, 253.

CASH NOTES.

See *Usury*, 1.

CHAMPERTY.

1. A contract to pay counsel a fee equal to one-fourth of the value of the land in contest, less by costs of the suit, and to wait until the land is sold for payment, is not champertous within the provisions of the statute of 1824. (*Wilhite* vs *Roberts*, 4 *Dana*, 172.) *Ramsey's devisees* vs *Trent*, 341.

CHARACTER.

1. In prosecutions involving character, it is competent for the defendant to give evidence of his general good character, but a prosecution for an assault does not so involve character as to authorize proof on the part of defendant of his general good character. (3 *Starkie's Ev.* 365.) *Drake* vs *Commonwealth*, 226.

CHOSES IN ACTION.

1. Though there are many choses in action which are not assignable, there are many transfers of choses in action arising, *ex contractu*, which Courts of Law will notice and protect. *Blankenship* vs *Cressillas*, 435.

CLERICAL ERRORS.

1. The Circuit Court may correct clerical errors in the decrees and judgments of the Court after the term expires; a decree or judgment against an executor or administrator, *in personam*, when it should have been to be levied of assets, is of that character; and unless application be made to the Court for its correction, no costs will be adjudged in this Court upon its correction by reversal, &c. *Cook's ex'ors* vs *Turpin*, 246.
2. The Circuit Court may correct clerical errors after the term has expired. A decree, *in personam*, when it should have been to be levied of assets in the hands of executor, &c., is a clerical error. *Ibid*, 247.

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COLLATERAL SECURITY.

1. Where notes are received as collateral security, the receiver is in general bound to use reasonable dilligence to collect. This rule held not to apply to a case where a trustee received, in Kentucky, the assignment of a lawyer's receipt of Georgia for notes there due, by which the lawyer obliged himself to collect and remit, &c. *Noland* vs *Clark*, 241.
2. Though in general he who receives notes as collateral security, is bound to use reasonable dilligence to collect, and if they are lost by negligence, he is chargable. This rule held not to apply to a case where the receipt of an attorney at law, residing in Georgia, for notes that was put into the hands of a trustee in Kentucky, in which receipt, the lawyer has promised to collect and remit. *Ibid*, 241.

CONDITIONS.

1. If the condition annexed to a conveyance of an estate be *subsequent*, the estate passes, though the condition be not performed; so if the condition be against law it does not prevent the estate from passing. *Myers* vs *Daviess*, 397.

CONSIDERATION.

1. Prior to the statute of 1801, courts of equity had exclusive jurisdiction to grant relief where there was a failure of consideration, and since that statute their jurisdiction is still exclusive, unless there be a total failure of consideration, in which case it is concurrent. *Case* vs *Fishback*, 41.
2. And in such cases the Chancellor will give the appropriate relief, unless the party has defended at law and failed: (2 *Bibb*, 200; 3 *Ibid* 246; 2 *J. J. Marshall*, 139.) *Case* vs *Fishback*, 42.

CONVEYANCES.

1. By the statute of 1810, (2 *Stat. Law*, 447,) deeds may be acknowledged or proved before the Clerks of County Courts, and upon such acknowledgment being duly recorded in the county where the land lies, and the Clerk receiving the acknowledgment or proof may also take and certify the acknowledgment and privy examination of the wife, which being also duly certified, and the deed recorded in the county where the land lies will pass the title. *Ford &c.* vs *Gregory's heirs*, 176,
2. By a fair construction of the same act a clerk of a County Court may take the privy examination of the wife, though he may not have taken the acknowledgment or proof of the deed. *Ibid* 177.
3. Since the passage of the act of 1831 concerning conveyances, two Justices of the Peace, without any commission, may take the acknowledgment and privy examination of *femes covert* to deeds of conveyance for land lying in any county of the State, passing dower or inheritance. *Shelton* vs *Deering*, 406.
4. The act of 1785 authorized two Justices of the Peace where the *feme* resided, having a commission for that purpose, to take the acknowledgment and privy examination of *femes covert* to conveyances. So did the act of 1792, to take relinquishments of dower in cases where husband had conveyed before that time; also "in all cases where a deed is made by the parties residing in the county where the land may lie, it shall be lawful for the *feme covert* to relinquish her dower in like manner." The act of 1831 having dispensed with the commission, two Justices may take relinquishments of dower. *Shelton* vs *Deering*, 406.

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CONVEYANCES—*Continued.*

5. The States have the right to prescribe the mode in which the titles to land within their territory may be passed by deed or will: (2 *Conf. Rep.* 438.) *Cornelison* vs *Browning*, 428.

CONSTABLES.

1. In an action of debt *vs* a Constable's surety, after the death of the principal, it is not necessary to aver the non-payment of the penalty of the bond by the representative of the principal, nor is it necessary to notice the death of the principal where the bond is joint and several. (1 *Chitty*, 49.) *Commonwealth for Coleman* vs *Hughes*, 163.
2. It is sufficient in a suit against a Constable or his sureties, to aver that a judgment was rendered and execution issued thereon, and, while in force, placed in the hand of the Constable, received by him and collected by him, while the bond was in force, and his refusal to pay it over. *Commonwealth for Shelton* vs *Hughes*, 461.
3. It is not necessary to aver in a declaration against a Constable or his securities in a suit to recover money collected on execution, that any demand was made of the money in the county—It is matter of defence to be shown by defendant. *Ibid*, 462.
3. Constables and their sureties are liable for moneys collected by the former upon notes, &c., as upon executions. *Ibid.*
4. Constables may perform their official duties in any part of the county in which they are appointed. *Ibid*, 463.

CORPORATIONS.

1. The dissolution of a corporation does not dissolve its contracts and obligations, and creditors may still enforce their claims in equity against any property of the corporation which may not have passed to *bona fide* assignees. *Dudley* vs *Price's adm'r*, 85.
2. The capital stock of the Lexington & Ohio Railroad Company, held to be a trust fund in the hands of the Company, and liable for the payment of its debts. *Ibid*, 86.
3. To subject such fund, the creditor must show that his legal remedies have been exhausted. *Ibid.*
4. Though a creditor cannot have a decree against the State for money due to a public officer who is insolvent, (as decided *Divine* vs *Harvie*, 7 *Monroe*, 439,) yet such decree may be rendered against a town or city corporation for money due to an officer at the filing of a bill of a creditor. *Speed, &c.* vs *Brown, &c.* 111.

COPIES.

See *Evidence.*

COSTS.

1. Will not be adjudged in the Court of Appeals where the only error complained of is a clerical error, and no effort has been made to correct it in the inferior Court. *Crook's ex'or* vs *Turpin*, 247.
2. Will not be decreed to a plaintiff in error in the Court of Appeals, when the error is clerical, and might have been corrected on application to the Circuit Court, unless the Circuit Court has refused to correct it. *Ibid*, 247.

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CURTESY.

1. It is the duty of the husband to take the possession of the land of the wife to strengthen her title; if he fails to do so during the coverture, he is not tenant by the curtesy after her decease. *Neely, &c.* vs *Butler, &c.* 50.
2. When the lands of the wife, to which she has the title, are unimproved, and the husband does not take possession of them during coverture, he has no right of curtesy in them upon the death of the wife. The doctrine of the New York Courts not approved. *Ibid.*

COVENANT.

1. An order for goods to a certain amount in value, containing an express promise to pay for them, is a covenant to pay that sum, if the goods be furnished. *English* vs *Young*, 142.

COVINGTON.

1. The act of the Legislature establishing the town of Covington decided to be constitutional by the case of *Kennedy's heirs* vs *Trustees of Covington*, (8 *Dana*, 356.) That decision regarded as valid. *Orr* vs *Foote, &c.* 388.
2. The act establishing the town of Covington, vested in the trustees 150 acres of land, and authorized them to sell and convey the lots laid off: Held, that a sale by them of parts not then laid off, passed at least an equity to the purchasers. *Ibid*, 391.

DAMAGES.—

1. Where a second injunction is obtained to a judgment at law upon filing a bil of review which was not authorized by the rules of chancery practice, damages should be awarded to the defendant. *Carter* vs *Stennet and Eason*, 254.

See *Injunction.*

DECREES.

1. It is not necessary to value lands sold under decrees in chancery: (1 *Dana*, 185.) *Haggins' heirs* vs *Gilman's Executor*, 214.
2. The decree directed the sale of the interest of the defendant in a tract of land described, to pay a balance of the purchase money, not specifying in the decree the extent of that interest—Held that the decree, though informal, was not erroneous, as the pleadings in the case clearly defined the extent of that interest. *Haggins' heirs* vs *Gilman's Executor*, 216.
3. A decree against executors and devisees should be to be first levied of the assets in the hands of the executor, if sufficient; if not, then to be levied of the estate devised. *Waring's Executor* vs *Waring*, 333.

DEBT.

1. May be maintained in the Circuit Court on an obligation to pay money by instalments—all the instalments being due—though some of the instalments be less than $50: (*Burn. on Actions at Law*, 357; *Harlson on Bonds*, 123.) *Brown's adm'r.* vs *Brown*, 248.

DEEDS.

1. A deed which is voidable when delivered, may be subsequently confirmed. *English* vs *Young*, 143.
2. Deeds are presumed to have been delivered on the day of their date, but their delivery may be proved to have been on a different day. A valid delivery must

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DEEDS—*Continued.*

precede the acknowledgment. (6 *Litt.* 465; 7 *J. J. Marsh.* 120.) And an acknowledgment is *prima facie* evidence of a delivery on the day of the date, though evidence may be adduced to show when the actual delivery took place. The statute requires deeds of conveyance to be recorded within a specified time after *delivery* not *after their date*. *Ford, &c.* vs *Gregory's heirs*, 180.

3. The alteration of a deed of conveyance, made by husband and wife, by which the wife relinquished dower, in a part which did not change its legal effect, if done by the consent of the husband—Held not to render the deed invalid as a conveyance of the dower of the wife. *Shelton* vs *Deering*, 407.

DEVISEES.

1. The term "lawful issue" not in all respects tantamount to the term "lawful heirs of the body." *Black* vs *Cartmel*, 193.
2. Illegitimate children may inherit from the mother, but are not such "lawful issue" as will take a remainder in an estate devised to her for life, then to her "lawful issue." *Ibid*, 194.
3. A devise to trustees to the use of A, a *feme covert*, for life and then to her "lawful issue," gives to A no such legal estate as will, in case of her death, pass to an illigitimate child. *Ibid*, 195.

DEVISES.

1. The words "heirs of the body" are properly used as words of limitation, and properly used for the creation of an estate tail, which is an estate to the person, and the heirs general, or special of his body. It is also true, that the words "heirs of the body," "heirs male" or female of the body or of two bodies, may be used as words of purchase. It is a question of *intention* in what sense they are used—When used to designate *persons*, they are construed words of purchase; when used to designate the whole line of succession, they are words of limitation. *Prescot* vs *Prescot's heirs*, 59.
2. Though an estate for life be expressly given, yet if the "heirs of the body" are then to take "share and share alike," or as tenants in common, or to be equally divided between them, this designation is sufficient to confirm the bequest to the children. (2 *Burr*, 1100; 11 *East*, 668; 6 *Taunt.* 94.) See *McNair's adm'r* vs *Hawkins*, (4 *Bibb*, 390.) *Ibid*, 59.

See *Wills.*

DEVASTAVIT.

See *Executors and Administrators.*

DEDICATIONS.

See *Roads*, 2.

DISSEIZOR AND DISSEIZEE.

1. If a disseizor sow the ground and sever corn grown upon the land, and disseizee re-enter, he shall have the corn, because he entered by a former title. (1 *Coke inst. sec.* 68, 55 *b.*) *Hooser* vs *Hays*, 73.

DISTRIBUTEES.

1. May sue after the lapse of nine months from the granting of administration whether a settlement has been made or not. *Commonwealth for Bell* vs *Hammonds*, 63.

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DIVISION OF LAND.

1. Where a proceeding is had before the County Court for division of land amongst heirs, the record of the County Court should show the names of the applicants and that the decedent died in the county, and that part of the real estate descended, lies in the county. *Rice* vs *Rice*, 420.

EASEMENT.

1. A deed conveying an easement passes such right to the grantee and all subsequent grantees. *Combs* vs *Stewart*, *&c.* 464.
2. But a collateral covenant that a vendee shall enjoy a particular easement, not part of the conveyance, passes no right to a subsequent vendee of the estate. *Ibid.*
3. An easement granted by a mortgagor after the mortgage—a foreclosure is had, to which the grantee of the easement is no party—he is not bound by the decree. *Ibid.*

EJECTMENT.

1. Upon executing a writ of *hab. fa.* upon a judgment in ejectment the officer may lawfully put out the defendant and all who are members of his family, or his tenants at will. (*Mattox* vs *Helm*, 5 *Litt.* 158) *Higginbotham* vs *Higginbotham & Clark*, 372.

ELECTION.

1. Where there is an uncertainty in a grant, the election is with the grantee. (*Viner's Ab.* 49.) That is certain which may be rendered certain. (*Shep. Touch.* 250.) *Armstrong* vs *Mudd*, 145.

EMANCIPATION.

1. A testator made his will in 1835, died in 1845, by it he declared that "all his slaves," naming them, "shall be and they are hereby declared to be free, (upon condition that they shall elect to go to Liberia,) shall be placed under the care of the testator's nephew until a fund shall be provided to pay their passage and sustain them six months in Africa." Two children born between the date of the will and the death of the testator—Held that the children born after the date of the will had the same right to elect to be free as those before. *Adams*, *&c.* vs *Adams*, 71.
1. I give and bequeath all my negroes their freedom, that my heirs or executors shall have no right or title to them after they arrive at the ages hereafter mentioned—the males at 28 and the females at 25—Held, that under this will the issue born before they arrived at 25 years of age of the mother was free—That emancipation of the mother was immediate upon the death of the testator—with a right to retain for service only until the age of 25. *O'Brien* vs *Goslee*, 101.

EQIUITIES.

1. As between equities priority gives preference. A prior equity with a legal advantage will not be disturbed in favor of a junior equity, though the legal advantage was acquired after a knowledge of the junior equity of the adversary. *Russell* vs *Petree*, 186; *Growning & Co.* vs *Behn. &c.* 385.

EQUITAS SEQUITER LEGEM.

1. Both at law and in chancery personal property and slaves should be first subjected to the payment of debts. *Hall and wife* vs *Sayre*, 47.

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EQUITABLE INTERESTS.

1. An insolvent debtor conveyed his property in trust to trustees for the benefit of *certain* creditors—a third person acquired the equity of redemption; a part of the real property remained after payment of the debts provided for, upon which additional buildings were erected by the debtor by consent of the holdor of the equity. A creditor, not provided for, had judgment and a return of *nulla bona*, filed his bill to have satisfaction out of the rent and interest of the debt or in the properry: Held that he was entitled to relief to the value of the improvement and interest therein. *Divine & Brown* vs *Steele*, 235.

EQUITY JURISDICTION.

1. The Chancellor has jurisdiction to decree a division of slaves, and a sale thereof for that purpose if it cannot be made in kind, and may decide upon the rights of each person claiming an interest therein. *Prescot* vs *Prescot's heirs*, 61.
2. The Chancellor will not interfere to cause a re-conveyance of property which has been fraudulently conveyed to evade the payment of debts: He will not enforce an executory contract founded upon illegal consideration or which is without consideration. *Ford's ex'or, &c.* vs *Lewis*, 128.

ESTATES.

See *Conditions.*

ESTOPPEL.

1. A mortgagee who stands by and sees the property sold on which he has a mortgage, without making known his mortgage claim, will be estopped thereafter to assert claim under his mortgage against the purchaser. (4 *B. Monroe*, 531.) *Argu. Bell* vs *Barclay & Ryan*, 263.
2. Yet a purchaser of property under execution upon which he had previously acquired a lien by attachment bill, is not precluded from relying upon his previous lien: (3 *B. Mon.* 133; *Ibid*, 580.) *Argu. Ibid*, 263.
3. The heirs of who one has conveyed is estopped to deny that the ancestor had title when he conveyed. *Upshaw* vs *McBride*, 204.
4. A mortgagor who stands by and sees the mortgaged property sold under execution and asserts no right, will be estopped thereafter to assert title against the purchaser. *Grace* vs *Mercer, &c.* 159.
5. One who enters under a particular title cannot, whilst so in possession, assert an adversary title without restoring the possession. *Upshaw* vs *McBride*, 205.

EVIDENCE.

1. Copies of writings of a private nature not required to be recorded, though from the files of the Courts, are only secondary evidence and inadmissible, unless the original are lost or destroyed—in possession of the adverse party, or beyond the jurisdiction of the Court. *Davidson* vs *Davidson*, 116.
2. The statute of 1795 authorizing copies of bonds, or other writings, in which two or more may be bound, and which may be filed in one district and suit brought in another, to be filed by the plaintiff, and made evidence on the trial, does not authorize such copies to be used in other cases where the action is not founded upon the writing. *Ibid*, 117.
3. In prosecutions involving the character of a defendant, he may give evidence of general good character. A prosecution for an assault does not so involve character as to authorize the defendant to adduce proof of his general good character: (3 *Starkie on Evidence*, 366.) *Drake* vs *Commonwealth*, 226.

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EVIDENCE—*Continued.*

4. Copies of notes in the hands of third persons, who may be required to produce them, are not competent evidence—the originals should be produced. *Bell* vs *Barclay and Ryan*, 262.
5. Title papers may be competent to show boundary when not so to prove title in the party offering them. *Orr* vs *Foote, &c.* 393.
6. Taken to prove a fact not in issue by the pleadings, should be excluded. *Smith-peters* vs *Griffin's Administrator*, 259.
7. The admissions of one partner after dissolution is not competent to prove a debt against the firm: (1 *Marsh.* 189; 6 *J. J. Marsh.* 614; 3 *B. Mon.* 266.) *Daniel* vs *Nelson*, 318.
8. A writing showing the true position of a line between the owners of land on each side thereof, is competent, when properly proved, to show where the line is between the parties, and all persons claiming under them. *Orr* vs *Foote*, 392.

EXECUTIONS.

1. May issue to the county in which the judgment was rendered; or that in which the defendant resides: (*Statute Law*, 646) but though an execution issue not in conformity to the statute, a sale of land thereunder will not be void: (1 *Mon.* 94; 3 *Ibid*, 479.) *Young* vs *Smith, &c.* 296.
2. It will not render a sale invalid, that the plaintiffs combined not to bid against each other, especially where the sale was open and public at the court house. *Young* vs *Smith, &c.* 297.
3. A levy upon a portion of the bricks in a kiln without separating them from the mass is valid—the officer may leave them in the kiln at his peril, and may sell so many bricks in the kiln, and the purchaser may open the kiln, and take them out in the ordinary way. *Hill* vs *Harris*, 120.

EXECUTION SALES OF LAND.

See *Land Sales. Sales of Land.*

EXECUTORS.

1. An executor acting under a will which was subsequently vacated, paid money to a legatee acting under such will—Held that the executor should be credited for the amount so paid, as the legatee was a creditor of the decedent to be applied to the payment of such demand. *Woods' Administrator* vs *Nelson's Executor*. 230.
2. An executor who held funds in his hands of the estate of his supposed testator, is bound for interest thereon, upon the will being set aside as invalid, from the time of filing the bill to set aside the will, and for an account—no refunding bond being necessary. *Ibid*, 230.
3. An executor in such cases should be paid for his services where they were valuable in the management of the estate. *Ibid.* But an executor of such executor cannot charge the first estate where suit was pending to vacate the will before the death of the first executor, though he may charge the estate of his immediate testator. *Ibid*, 231.
4. Where certain acts are directed by the testator by his will to be done, but no express direction as to the person by whom it is to be done, the duty devolves upon the executor: (7 *Monroe*, 304.) *O'Neal and Wife* vs *Beall*, 273.
5. Can an executor, who is nominated such by the will, but who has not qualified but intends to do so, perform an act which will bind an executor who does qual-

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EXECUTORS—*Continued.*

ify? *Qu:* If an executor who has not qualified do an act which appertains to the duty of executor who has qualified, afterwards qualify, it is binding, not from the fact of being nominated by the will, but from his subsequent qualification. *Carter's ex'or* vs *Carter*, 330.

6. Does the qualification of one executor, without the other, amount to a refusal by the latter. *Query. Ibid.*
7. That an executor may be liable for *devastavit* in not properly managing the estate, will not affect the right of a purchase of property which the executor might have saved from sale. *Myers* vs *Daviess*, 399.

EXECUTORS AND ADMINISTRATORS.

1. Where the will, under which an executor has been qualified and acted, is subsequently vacated, it is proper that his acts, so far as they were beneficial to the estate, should be confirmed. If he paid money to one who was supposed to be a legatee, who was in fact a creditor only, he should be credited by the amount as paid to a creditor. He is bound for interest on funds in his hands from the time of filing the bill to vacate the will, &c. No refunding bond could be required by him—and such executor should be paid for his services, so far as they were valuable to the estate; but the executor of such executor cannot charge the estate of the first decedent. *Wood's adm'r* vs *Nelson's ex'or*, 230.
2. A testator devised the whole of his estate to trustees, the widow renounced the provisions made for her by the will, and had dower assigned in certain slaves of the testator: Held that the trustees, who were in effect executors, were only divested of right in the slaves to the extent of the dower interest of the widow, and the reversion remained in the trustees, and was subject to sale under execution upon a judgment against the trustees. *Myers* vs *Daviess*, 397.
3. An executor or administrator who, before the act of 1839, paid bond or simple contract debts before judgment debts which were in force in the county where the testator intestate died, was guilty of a *devastavit*, and became personally liable of his own estate to pay the judgments: (5 *Dana*, 353.) *Place, &c.* vs *Oldham's adm'r*, 401.
4. May properly be required to give injunction bonds in Kentucky—the statutes of Kentucky requiring injunction bonds enjoining judgments, makes no exception in behalf of executors. *Mahon, &c.* vs *Tydings, &c.* 353.

EXECUTORS.

See *Trustees.*

EXONERATION OF PERSONAL ESTATE.

See *Wills.*

EX OFFICIO SERVICES.

1. Clerk's and Sheriffs fees incurred in proceedings against guardians, directed by the statute, are not *ex officio* services, but properly chargable against the guardian, if found delinquent. *Commonwealth* vs *Shanks*, 305.

EXTINGUISHMENT OF DEBTS.

1. The receipt of one note by assignment in lieu of another, is an extinguishment of the first, and though the last be not paid, the first will not be resuscitated. *Berry* vs *Stockwell, &c.* 300.

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FEDERAL COURT.

See *Removal of Suits.*

FEMES COVERT.

1. It is a general rule that a *feme covert* cannot contract as a *feme sole*, nor as such sue or be sued, and cannot at law bind herself in respect to her separate property; and courts of equity will not ordinarily entertain jurisdiction to apply her separate property in the hands of a trustee to the payment of her engagements: (2 *Roper on Husband and Wife*, 236; 2 *Ves.* 138) though she may charge her separate estate when she shows an intention to do so: (2 *Roper supra* 240-44.) *Coleman* vs *Woolley's Executor*, 321.
2. If a married woman live separate from her husband, the general inference is that those who deal with her, credit her upon the faith of her separate estate, and it may be subjected in equity: (2 *Roper*, 244.) *Ibid*, 321.
3. The employment of counsel by a *feme covert* living separate from her husband, to defend her son charged with murder, held to be such a meritorious claim as would authorize the Chancellor to decree its payment out of her separate estate. *Ibid*, 323.

FERRIES.

1. The statute of 1831: (1 *Statute Law*, 715) regulating the keeping of ferries on the Ohio is highly penal, and in its construction should not be carried beyond the clearly expressed intention of the Legislature. *Brasher* vs *Kennedy*, 29.
2. The hirer of a slave is, in legal contemplation, the owner for the term of hiring, so far as to give consent to his crossing the Ohio, which will exonerate the ferry keeper from the penalty denounced by the act of 1831: (1 *Statute Law*, 715.) *Moore* vs *Foster*, 255.

FORCIBLE ENTRY AND DETAINER.

1. Cannot be maintained without there has been actual possession—a mere legal seizin is not sufficient. *Neely, &c.* vs *Butler, &c.* 50.
2. A possession received by an agent from the Sheriff, upon executing a writ of *hab. fa.* is the possession of the principal, and such principal may maintain forcible entry and detainer upon being divested of such possession: *Kercheval* vs *Ambler*, (4 *Dana*, 167.) *Higginbotham* vs *Higginbotham and Clarke*, 371.

FRAUD.

1. One greatly involved sold all his interest in his grandfather's estate, estimated to be about $1100, for $400 and ten years boarding in future of himself—Held that such contract was fraudulent. *Hawkins, &c.* vs *Moffit*, 82.

See *Partnership*, 2.

GAMING.

1. One who pays a gaming debt at the request of a looser, may recover from such looser the money so paid, though he had knowledge that it was a gaming debt. *English* vs *Young*, 142.

GRANTS.

1. When several grant by one deed the separate interest which each has in an estate, the covenants shall be considered as extending to the interest granted—(1 *Chitty*, 47,)—and if they separately warrant, the warranty extends to the interest granted. Suits for breach of such warranty, should be several. *Evans* vs *Sanders, &c.* 292.

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HABERE FACIAS.
See *Ejectment.*

HEIRS,

1. By the first section of the act of 1819, (*Stat. Law*, 180,) suits are authorized against heirs or devisees after judgment against the administrator or executor, and a return of no property of the decedent in the hands of executor or administrator. No suit for a *devastavit* or bill of discovery against the executor or administrator is necessary. *Litsey and wife* vs *Smith's adm'r*, 75.
2. Such suit cannot be defeated by the heir or devisee by reason of any delay in pursuing the personal representative, unless it was fraudulent. *Ibid*, 76.

HEIRS AND DEVISEES,

1. Are liable to creditors, under the act of 1819, after judgment and a return of *nulla bona* against the executor or administrator, and the creditor is not bound to pursue the latter or their sureties, or to investigate the correctness of the administration. *Litsey and wife* vs *Smith's adm'r*. 77.

HIRERS OF SLAVES.

1. The hirer of a slave, consenting to his crossing the Ohio, might be liable for the same in case of his escape. *Argu.* *Moore* vs *Foster*, 250.
See *Slaves.*

HUSBAND AND WIFE.

1. A conveyance of land to a *feme covert* does not give to her a separate estate in the technical sense of that phrase. *Hall and wife* vs *Sayre*, 46.
2. *Qu*—Can a *feme covert*, without an express power be given, charge her separate real estate by note for the payment of money, or can a Court of Equity enforce the payment of such note by a sale of land. *Ibid.* *See Coleman* vs *Woolley's executor, Post.*
3. The right of the husband in the slaves of the wife which are hired out at the marriage, is not a mere *chose in action*—the slave vests in the husband, at least *sub modo*; and upon the death of the wife, even before the expiration of the hiring, the husband is entitled to the slave: *Banks* vs *Marksberry*, 3 *Litt.* 283-4; *Turner* vs *Daviess*, 1 *B, Mon.* 152.) And in such case, the executor of the husband having recovered the slaves at law, the administrator of the wife is concluded from asserting title in chancery to the slaves. *Morrow* vs *Whiteside's ex'or*, 412.
4. The liability of the husband to the debts of the wife before marriage, continues only during the coverture; on her death his liability ceases, and he is not liable either at law or in chancery, though he may have received estate by the marriage. *Ibid.*
5. Assignees in bankruptcy and assignees of the husband, of the wife's *choses in action*, or equitable interests, take subject to the equity of the wife to a settlement: (*Roper on Husband and Wife, vol.* 1, 263-273; *Clancy on Married Women*, 294 *to* 570; 2 *Storey's Equi.* 638.) *Crook's ex'or* vs *Turpin*, 244.
6. The right of the wife to a settlement exists till the husband, or his assignee, actually obtain possession of the money or property. (*Clancy*, 441; 2 *Dana*, 437.) *Ibid.*
7. The payment of a fund to the assignor of the husband, out of which the wife has an equity to a settlement pending a suit for that object, will not affect the right of the wife. *Ibid*, 245.

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HUSBAND AND WIFE—*Continued.*

8. The wife uniting in a conveyance with the husband and relinquishing dower, is not a surety of the husband in the warranty of quantity or title. *Shelton* vs *Deering*, 407.
9. The payment of the fund to the assignee of the husband, pending a suit by the wife for a settlement, will not affect the right of the wife: (4 *Vesey*, 48) *Crook's ex'ors* vs *Turpin*, 245.
10. A vested remainder in slaves which vested in the wife prior to the 23d February, 1846, became vested in the husband where the marriage occurred before that date, and liable to the payment of the husband's debts, though the life estate was not determined until after the 23d February, 1846. *Jackson's adm.* vs *Sublett*, 469.

IMMATERIAL ISSUES.

See *Practice.*

INDORSERS.

1. A promise made by an indorser to pay a bill, made when he was ignorant that he was exonerated by the *laches* of the holder, is not obligatory. *Bank U. S.* vs *Leathers*, 66.

INFANTS.

1. A horse not considered, under certain circumstances, a necessary for an infant. *Smithpeter's* vs *Griffin's admr*, 260.

INFANTS' REAL ESTATE.

1. It is competent for the Legislature to authorize the sale of infants real estate in Kentucky, though they be non-residents, upon the petition of the guardians—and the infants are not otherwise necessary parties to the proceeding than through their guardian. *Nelson's heirs* vs *Lee*, 509.
2. Infants whose lands have been sold under the decree of the Chancellor, may, on arriving at full age, waive any irregularity in the proceedings, and insist upon its enforcement against a purchaser, and have a specific performance of the contract of sale. *Ibid*, 510.

INJUNCTION.

1. When a second injunction is obtained upon filing a bill of review, which was dissolved because the filing of the bill was not authorized, damages should be given. *Carter* vs *Stennet & Eason*, 254.
2. A decree directing the payment of money which has been enjoined in the hands of a party to the suit, is, in effect, a dissolution of the injunction, and giving direction to the fund. *Crook's ex'or* vs *Turpin, &c.* 246.

See *Damages.*

INJUNCTION BONDS.

1. Upon an injunction bond executed to several *jointly*, as obligees, debt may be maintained in the name of all for an injury to either by a failure to perform the condition. (1 *Chitty*, 9-10.) *Watts, &c.* vs *Sanders, &c.* 374.
2. When the condition of an injunction bond is to "prosecute the injunction with effect," and the ground relied upon for the injunction be removed after the injunction is granted, and the Chancellor dismiss the bill and dissolve the in-

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INJUNCTION BONDS—*Continued.*

junction because the ground has been removed by the defendant, it is a prosecution of the injunction *with effect*, and there is no liability on the bond. *Watts, &c. Sanders*, 374-5.

3. Given by executors and administrators, should secure to the defendant all the rights and legal consequences resulting from an unsuccessful prosecution of the injunction, that exists in his behalf at its obtention, or may follow its dissolution, to the extent of assets, and to that extent should the surety be bound. *Mahan, &c.* vs *Tydings*, 354.
4. In suits upon injunction bonds given by executors, binding them to pay out of assets only, it is necessary to make other averments than that the injunction is dissolved, and the debt not paid. It should aver assets to pay and a waste thereof, or some other such averment to make the executor and surety personally liable. *Ibid*, 355.
5. Injunction bonds, though given by an executor or administrator, are *prima facie* upon good consideration. *Ibid*, 352.

See *Executors and Administrators.*

INTEREST.

1. May be recovered on rent where the sum is certain, as well as for any other consideration. *Burnham* vs *Best*, 228.

INSTALMENTS.

See *Debt.*

JOINT OBLIGEES.

See *Injunction Bonds.*

JUDICIAL SALES.

1. The reversal of a judgment or decree does not affect a purchase made under either while the judgment or decree is in full force. *Bank of Kentucky* vs *Vanmeter*, 68.
2. Praying an appeal from a judgment or decree does not have the effect of suspending its execution during the time given by the Court for executing the appeal bond. *Ibid.*
3. A sale made under a decree, which is sanctioned by the Court, is in general effectual to pass the title to the purchaser, though he be the successful party to the suit, and notwithstanding the decree be afterwards reversed—not so when the purchase is directly from the successful party. *Clark's heirs* vs *Farrow*, 460.

JUSTICES OF THE PEACE.

1. The act of 1840, giving jurisdiction to Justices of the Peace to hear and determine cases of trespass and trespass on the case—authorizes an appeal to the Circuit Court from their decisions. *Waggener* vs *Highbaugh*, 197.
2. Where the damages for breach of warranty are laid at less than £5, Justices of the Peace have jurisdiction to hear and determine. *Evans* vs *Sanders, &c.* 292.

JURISDICTION.

See *Consideration*, 1.

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LAND SALES.

1. The production of a replevy bond and execution, under which land was sold, is sufficient to uphold such sale, and a purchaser to show that the sale was under a judgment is not bound to go behind the replevy bond. *Floyd* vs *McKinney*, 90.
2. The failure of the Sheriff, after the amount of the execution is bid, to inquire if any one would pay the debt for a less quantity of land, is an irregularity which will not invalidate the sale, if not caused by any act of the purchaser: (3 *A. K. Marshall*, 619.) *Ibid*, 91.
3. It is not error to decree a sale of an interest in land to pay the debt of the defendant, or discharge a lien, without dividing the land, when the interest was clearly defined. *Haggins' heirs* vs *Gilman's Executor*, 219.

LANDLORD'S LIEN.

See *Rent*.

LAPSE OF TIME.

1. After the lapse of 40 years bond for title to land presumed to have been satisfied. *Upshaw* vs *McBride*, 204.

LEVY OF EXECUTIONS.

See *Executions*.

LEX LOCI CONTRACTUS.

1. The place of making a contract and of performance, gives the law of the contract: (*Storey's Conflict of Laws*, 62.) *Cross* vs *Petree*, 416.

LIMITATION.

1. A replication to a plea of the statute of limitations, of 1838, by a security, averring that seven years had elapsed, &c. and which replication averred that the defendant had removed out of the county before the lapse of seven years, whereby the plaintiff had been obstructed in bringing his suit, held to be a good replication. *Prather* vs *Ross*, 16.
2. The statute of limitations limiting the prosecution of suits against the sureties of administrators, guardians, &c., (3 *Stat. Law*, 558,) was intended to be general in its operation, and applies as well to cases where the distributees were of full age at the date of the bond, as to cases where part were of full age and part minors; where all are of full age at the date of the bond suit must be brought within five years from its date; if part are of full age, suit must be brought within five years from the arrival of the youngest of full age. *Commonwealth for Bell* vs *Hammond*, 63.
3. When new matter is introduced into a suit in chancery by amended pleadings, the statute of limitation, as to such matter, runs to the time of filing such amended pleadings. *Dudley* vs *Price's admr*, 88.
4. Statute of limitation being intended to give repose to those having right or apparent right, should be liberally construed with the view to attain the object intended. *Argu. Phillips* vs *Pope's heire*, 165.
5. The act of 1840, limiting the time of bringing suits by widows or their heirs for land which she had attempted, but ineffectually, to convey during coverture, must be confined in its operation to the cases enumerated in the statute. In all other cases the widow or her heirs have 20 years in which to bring their actions after the right accrues. (*Ibid.*) But suits by a widow or her heirs for land which she had attempted to convey, and in the cases provided for in the

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LIMITATIONS—*Continued.*

act of 1840, must be brought within three years from the time the right of action accrued to widow or her heirs. If the husband be not tenant by the curtesy, the right of the heir accrues upon the death of the wife, and her right upon the death of the husband. *Ibid*, 171.

6. The statute of 1840, limiting actions by widows and their heirs, should be construed as the statute of 1796, as modified by the act of 1814, in respect to its savings. *Phillips* vs *Pope's heirs*, 174.

7. Accounts not between merchant and merchant not relating to the trade of merchandise; are not within the exceptions named in the statute of limitations. *Smith* vs *Dawson*, 113.

8. The Courts of Kentucky so construe the statute of limitations to actions of actions of accounts, as to bar a recovery for all items sold more than the length of time before suit, which is prescribed by statute. (See cases cited.) *Ibid*, 114.

9 The limitation to suits against securities, prescribed by the act of 1838, (3 *Stat. Law*, 339,) must be pleaded at law, and is not available in chancery after a judgment at law. *Willis* vs *Caldwell*, 199.

10. To secure the right of the heirs of a *feme covert* to recover land which she had attempted to convey during coverture, all the heirs and not part only, must labor under disability at the time the right accrues, unless the suit be brought within three years, under the statute of 1840: *Phillips* vs *Pope's heirs*, (*ante. page* 174.) *Dobyns, &c.* vs *Schoolfield, &c.* 313.

11. By the statute of 1840, (3 *Statute Law*, 413,) the limitation commences to run from the time the right of action accrues and not before. *Ibid*, 312.

LIEN.

1. An attaching creditor, by bill in chancery, does not waive his attachment lien by bidding for the attached property at a sale made under executions which bound the property before the levy of the attachment. *Beall* vs *Barclay and Ryan*, 264.

2. One who purchased property which was bound by execution, though he purchased of the defendant in the execution, if the price went to discharge the execution lien, should have his money refunded before an attaching creditor, though his attachment was pending at the sale. *Ibid.*

3. Where there are several purchasers of property mortgaged, or upon which other lien exists, they are liable, or the property in their hands, to a *pro rata* contribution to the discharge of the lien: (3 *B. Monroe*, 508; *Ibid*, 314.) The value of the property at the date of the decree, is the proper period at which to make the estimate. *Ibid*, 265.

4. Notes given for the purchase of land, remain a lien upon the land, though they may be renewed. *Muir* vs *Cross, &c.* 281.

5. But where the holder of a note given for land surrenders it, and takes the note of another assigned to him by a third person, it is not a *renewal*, and the lien is lost—it is a new debt, and the remedy of assignee against assignor is the only remedy in case of the insolvency of the obligor. *Ibid*, 282.

6. Where a note given for land has been so united and blended with other notes and dealings, as to render it difficult to ascertain the real balance due for the land, and it is not ascertained, the claim of lien should be rejected. *Ibid*, 284.

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LIEN OF VENDOR.

1. A vendor having conveyed, acknowledging the payment of the consideration, cannot enforce his lien against a mortgagee, who took his mortgage in ignorance of the lien. *Growning & Co.* vs *Behn, &c.* 385.

MALICIOUS SUITS.

1. A declaration in case for wrongfully procuring an injunction by which the plaintiff was deprived of the use of his land, should aver that the injunction was obtained *maliciously* and *without probable* cause. *Cox* vs *Taylor's admr*, 21.
2. But if the suit be upon the injunction bond for any violation of its provisions, it is not necessary to aver malice and want of probable cause. *Ibid.*
3. Though an injunction might have been rightfully obtained, its malicious and wrongful continuance might be a cause of action, though the action for its obtention might be barred. *Argu. Ibid*, 17.
4. That an injunction bond has been required and given does not deprive the party injured from suing for injuries not provided for by the injunction bond. *Ibid*, 22. See *Injunction bonds.*

MARRIED WOMEN.

See *Husband and Wife.*

MERGER.

See *Bar.*

MESNE PROFITS.

1. Cannot be recovered for a longer term than five years before suit, nor until possesion be regained: (6 *B. Mon.* 489; *Adams on Ejectment*, 333.) *Cox* vs *Taylor's adm'r*, 19.

MISNOMER.

See *Practice.*

MORTGAGES.

1. Property sold under execution, subject to mortgage, should be sold as property in other cases—so if sold irrespective of the mortgage. A sale of land and slaves in gross where they are mortgaged, and purchased by the mortgagee, should be treated as a nullity. *Lee &c.* vs *Fellowes, &c.* 119.
2. A mortgagee accepting a mortgage as well for his own benefit as for certain sureties of the mortgagor, is bound to make a *pro rata* distribution of the mortgage fund. *Willis* vs *Caldwell*, 199.
3. A mortgage, appearing to have a scrawl attached thereto, was recorded without its being placed upon the record: Held that a party objecting to it on account of the want of a seal or scrawl, must show that it had no seal or scrawl when recorded. *Growning & Co.* vs *Behn, &c.* 386.
4. Property mortgaged, whether in possession of mortgagee or mortgagor, may be taken by an officer and sold under execution, and the declaration of the officer that he intends to sell, disregarding the mortgage, does not affect his right to the possession of the property to make the sale. *Squires, &c.* vs *Smith*, 35.

NEGOTIABLE NOTES.

1. A note given to renew a note for a loan obtained from a bank in a sister State, is valid, and a mortgage given to secure the payment of such note and all notes given for its renewal are valid, whether they be made in Kentucky or elsewhere. *Handy* vs *Commercial Bank of New Orleans*, 100.

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NEW TRIAL.

1. That one of a petit jury is of the same name of the foreman of the grand jury who found the indictment, is not a ground which can avail for a new trial in this Court, if not made in the Circuit Court. *Drake* vs *Commonwealth*, 225.
2. If evidence be given of two assaults upon the trial of an indictment charging one assault only, and not objected to in the Circuit Court, it will be no cause for a reversal in the Court of Appeals. *Ibid.*
3. The principles governing the Court of Appeals in revising the judgments of the inferior Courts in overruling motions for new trials, are more rigorous than in cases where a new trial has been granted, especially where a new trial is necessary for the attainment of justice. *Ford, &c.* vs *Gregory's heirs*, 182.
4. No new trial should be granted, though the finding of the jury may be against the weight of the evidence, unless it be flagrantly so. *Moore* vs *Foster*, 256.
5. The Court may, in deciding upon the propriety of granting a new trial, consider the admissibility and effect of a deed read in evidence to the jury, though not objected to, where the ground relied upon is that the verdict is against law and evidence. *Young* vs *Smith, &c.* 297.
6. Where there was a joint action of trespass against two or more, and part are acquitted and part convicted of the trespass, plaintiff can have no new trial as to those acquitted, without entering a *nolle prosequi* as to those found guilty, but those convicted may have a new trial without uniting with those acquitted in the application. *Allen, &c.* vs *Feland*, 307.
7. Though the verdict of the jury might have been the same, if improper testimony had not been admitted, yet where such testimony may have influenced the finding of the jury, a new trial should be granted. *Daniel* vs *Nelson*, 317.
8. That one of the jurors who tried the case, was of the same name with the foreman of the grand jury, who found the indictment for a misdemeanor, is not an available objection to the verdict when made for the first time in the Court of Appeals. *Drake* vs *Commonwealth*, 225.
9. That evidence was improperly admitted which might have been excluded if objected to, is no ground for reversal in the Court of Appeals. *Ibid.*
10. Though the evidence may be sufficient to sustain the finding of the jury, if they had not been erroneously instructed by the Court, yet if the Court misinformed the jury of the law upon the point in issue, the verdict should be set aside. *Field* vs *Deatley*, 5.
11. Where the minute book of the clerk shows that a plea was filed, the jury sworn to try the issue, and a trial had as though such plea, (with leave to give special matter in evidence) was on file, no objection after a trial upon the merits, should avail for want of plea for a new trial: (1 *J. J, Marshall*, 591, *pr. dec.* 225; 4 *B. Monroe*, 200.) *Elliott* vs *Treadway*, 24.

NOTES PROMISSORY.

See *Surety.*

NOTICE.

1. Information which puts a party upon inquiry is sufficient notice. *Russell* vs *Petree, &c.* 186.

OFFICERS.

1. An officer having process cannot justify his acts done under such process unless he return it with an endorsement of his acts done under it, nor can the plaintiff

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OFFICERS—*Continued.*

if he be instrumental in preventing its return by the officer: (1 *Salk.* 406; *Watson on Sheriffs*, 7 *vol. Law Lib.* 63,) unless the defendant concurred—not so with those who acted by command of the officer. *Allen, &c.* vs *Feland*, 309.

ONUS PROBANDI.

See *Mortgages.*

PARTIES.

1. In a suit against one of several obligors in a guardian's bond, it is no objection that another of the obligors is the next friend of the infant plaintiff. *Commonwealth for Reynolds* vs *Kinnard*, 249.

See *Injunction Bonds, Purchaser pendente lite.*

PARTIES IN CHANCERY.

1. When a party to a suit is a bankrupt, becoming so after suit brought, the assignee, on whom all his interests devolve, should be a party; and it should appear in the case that the assignee is cognizant of the proceedings—a supplemental bill setting up his interests, &c., is an appropriate proceeding, to bring him before the Court. *Pawlings* vs *McGlashon*, 301.

PARTNERS.

1. The admission of a partner after the dissolution of the partnership, is not competent to prove a debt against the firm: (1 *Marsh.* 189; 6 *J. J. Marsh.* 604; 3 *B. Mon.* 266.) *Daniel* vs *Nelson*, 318.
2. One partner cannot, without the consent of the co-partner, appropriate the partnership effects to the payment of his individual debts: (16 *John. Rep.* 34; 9 *B. Mon.* 196.) *Bourne* vs *Wooldridge*, 494.
3. When a contract of partnership is superinduced by the fraud of one party, the Chancellor will dissolve it, and compel the party guilty of the fraud to indemnify the other, saving the right of creditors of the firm. *Hynes, &c.* vs *Stewart & Owen*, 432.

PLEADING.

1. In a suit against a Constable and sureties upon his bond for failing to collect and pay over money upon execution, it is necessary to aver that the liability occurred during the time when the sureties were bound, *i. e.* the two years. But an averment that the executions were placed in the hands of the Constable within the two years from the date of his bond and *collected by him during continuance in office*—Held sufficient. *Commonwealth for Coleman* vs *Hughes*, 162.

See *Rent.*

PERSONAL ESTATE.

See *Wills.*

PET. AND SUMMONS.

1. The words *or order* are not so essential in a promissory note, as to render a petition in a suit defective, where they were omitted in the attempt to insert the substance of the note. It was assignable without the words "*or order.*" *Maxwell* vs *Goodrum*, 286.
2. Nor is the failure to insert the seal in the petition filed, a fatal defect, though it be affixed to the note, it is equally obligatory without it: (*Stat. Law*, 343.) *Ibid.*

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PLEADINGS AT LAW.

1. A plea that the note sued on was given for rent, and that the contract of renting had been rescinded without any averment that the note was by the contract of recission to be surrendered, and that defendant had performed his part of the contract of recission—held to be bad. *Childers* vs *Smith*, 236.

2. A declaration against the master for the acts of his servant, should not charge the act to have been *wilfully*, but negligently done: (1 *East.* 106; 3 *Ibid* 593; 2 *Chit. Plead.* 710, *note.*) *Brasher* vs *Kennedy*, 30.

3. Suit upon promises against an executor or administrator upon promises by the testator or intestate, and a third person, and upon promises by the testator alone, may be joined in Kentucky since the statute of 1797: (1 *Statute Law*, 318.) *Haggins' heirs* vs *Gilman's ex'or.* 217; *Hamlet* vs *Bates' ex'or.* 437.

4. Where the declaration is defective, a demurrer to pleas should be overruled, however defective they may be, and the declaration declared defective. *Mahan, &c.* vs *Tydings, &c.* 361.

PRACTICE IN THE COURT OF APPEALS.

1. A paper purporting to be a bill of exceptions, certified by the clerk, but not noticed upon the record, cannot be regarded by the Court of Appeals as part of the record. *English* vs *Young*, 141.

PRACTICE IN SUITS AT LAW.

1. When a demurrer is overruled, the party may, in the Circuit Court, withdraw it and plead again, which implies a withdrawal or abandoment of it. In like manner, if it be overruled by the Court of Appeals, the party upon the return of the case should be permitted to plead over. So of other pleadings. *O'Neal and wife* vs *Beall*, 276.

2. That an action against an administrator is in the *debet et detinet*, is a technical objection not now available: (3 *Mon.* 224–5; *Ibid*, 390.) *Brown's adm'r* vs *Brown*, 247.

3. A plaintiff who brings a joint action of trespass against several defendants and obtains judgment against part only of such defendants, cannot have a new trial as to such of the defendants as were acquitted, without entering a *nolle prosequi* as to the others. But the defendants who are found guilty may have a new trial without joining those in the application who were acquitted. *Allen* vs *Feland*, 307.

4. A party filing exceptions to depositions should ask a decision upon the exceptions, if that course be not pursued, this Court will presume that the exceptions were waived. *Armstrong* vs *Mudd*, 146.

5. Though a witness be assailed successfully, yet if there be other sufficient testimony to sustain the decree it will not be reversed. *Russell* vs *Petree, &c.* 186–7.

6. It is the duty of the Court to see that the finding of the jury be put in proper form to carry out the intent of their finding. *Craig* vs *Taylor and wife*, 55.

7. Filing a replication after a demurrer to plea overruled, is a waiver of any objection to the decision of the Court upon the demurrer: (3 *Marshall*, 631.) *Carson* vs *Osborn*, 155.

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PRACTICE IN SUITS AT LAW—*Continued.*

8. It is error in the Court to instruct the jury upon the evidence to find for one party where there is conflicting testimony, though there may be evidence conducive to prove a state of fact which may authorize such finding, unless such instructions be predicated upon the belief of the fact from the evidence which would justify such finding. *Carter's ex'or* vs *Carter*, 328.
9. An obligor may be sued by the name on the bond, whether it be the full name or not; and if the defendant be declared against by his right name, though it varies from the process, he cannot plead in abatement: (1 *Chit. Plea.* 486.) A declaration against W. G. Hughes and Phi. Berry, (as they signed the bond,) process against W. *alias* Willis G. Hughes, and Phi. *alias* Philander Berry: Held to be neither variance nor misnomer. *Commonwealoh for Coleman* vs *Hughes*, 160.
10. No judgment should be rendered upon the finding of an issue which is immaterial. *Ibid*, 156.

See *Award*, 1.

PRACTICE IN CHANCERY.

1. There can be no decree against the denial of the answer without proof. To authorize a decree in favor of vendor against a purchaser of land of the vendee for an alleged balance of the price, the complainant must prove that the notes set up were given for the land. *Growning & Co.* vs *Behn, &c.* 384.
2. When an answer had been lodged with the Clerk in proper time, and that fact known to complainant, though not formally noted on the record, but treated by the Court and parties as part of the record, this Court will so regard it. *Carter* vs *Stennet and Eason*, 253.

PRESUMPTIONS.

1. Where a suit was brought to foreclose a mortgage, and vigilantly prosecuted until ready for decree and then dismissed for want of prosecution and that disposition long acquiesced in—held that it authorized the presumption that the mortgage debt was paid off. *Nelson's heirs* vs *Lee*, 503.

POSSESSION—SEIZIN.

1. A patent does not give to the patentee *actual*, but *legal* seizin only: (2 *Bibb*, 412; 4 *Ibid*, 57.) *Neely, &c.* vs *Butler, &c.* 50.
2. Trespass cannot be maintained upon a *legal* seizin alone—nor the writ of right—nor forcible entry and detainer. *Ibid.*

PRINCIPAL AND AGENT.

1. Though there be a written contract between an agent and another, if the name of the principal be not disclosed, but the principal afterwards recognize the contract as made for him, assumpsit lies against the principal, and the writing is proper evidence to show the terms of the contract. *Violett* vs *Powell's adm'r.* 349.

PRO RATA DISTRIBUTIONS.

See *Executors and Administrators.*

PURCHASERS *PENDENTE LITE.*

1. A purchaser from a successful party in a suit for land is not a necessary party to a bill of review: *Debell* vs *Foxworthy's heirs*, (9 *B. Monroe*, 228) and is

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PURCHASERS *PENDENTE LITE—Continued.*

bound by any decision upon such bill, or upon a writ of error, or appeal. *Clark's heirs* vs *Farrow, &c.* 449.

REMAINDERS.

1. A devise over upon a contingency does not prevent a vesting of estate in the mean time, provided the words used be sufficient to pass an estate *in presenti*: (*Roper on Legacies*, 403.) *Jackson's adm'r* vs *Sublett*, 472.
2. A vested remainder gives an immediate fixed right of future enjoyment. *Ibid.*
3. A vested remainder in slaves accruing to a *feme covert*, vests in the husband, and if the particular estate determine during his life he may sue, and if he survive the wife even without administering upon her estate: (6 *Lit.* 335; 7 *Mon.* 216.) *Ibid*, 473.

REMOVAL OF SUITS.

1. The 12th section of the judiciary act of 1789 of the United States, does not authorize the transfer of a suit in the Circuit Court, on a writ of error, to the County Court, for probate of a will to the Federal Court, especially where a part only of the parties on one side are non-residents. *Tibbatts, &c.* vs *Berry, &c.* 490.

RENT.

1. Assumpsit may be maintained for rent where the premises have been enjoyed at a stipulated price. *Burnham* vs *Best*, 227.
2. Though rent be an incident to the reversion, it may be separated from it—a grant of the rent may be made, leaving the reversion in the grantor—and in such case, a subsequent grant of the reversion will not pass the rent. *Childers* vs *Smith*, 237.
3. A plea averring that the note sued on was given for rent, and that the contract of renting had been rescinded without any averment that the note was to be surrendered, or that the defendant had complied with his part of the terms of recission, held invalid. *Ibid*, 236.
4. Where there is no formal lease, but an express promise to pay a stipulated price for the use of land, assumpsit is maintainable. *Burnham* vs *Best*, 227.
5. When the term has been enjoyed and the rent payable in money, it may be recovered on the common count for use and occupation, though there was a special contract. And where one of five heirs enjoyed land under a contract to pay rent to the co-heirs: Held that they could maintain a joint action of assumpsit for four-fifths of the entire rent. *Ibid*, 228.
6. Since the act of 1843, (*Session Acts*, 54,) after a tenant enters upon the premises leased, he cannot mortgage his property so as to defeat the landlord of his rent for one year before issuing a distress warrant. Though the right to rent is generally an incident to the reversion, it is not universally so. A grant of the rent may be made separately, in which case a subsequent grant of the reversion does not pass the rent. *Childers* vs *Smith*, 237.

REPLEVIN.

1. The fact that an officer having an execution against a mortgagor, declares his intention to sell disregarding his mortgage, does not affect the right to the pos-

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REPLEVIN—*Continued.*

session to make the sale, nor authorize the mortgagee to maintain replevin to take the property from the officer. *Squires, &c.* vs *Smith*, 35.

RECISSION.

1. It is not presumed that an ordinarily prudent man would make a large investment in the purchase of land in the woods near to a large river (the Mississippi) without the exercise of reasonable diligence to ascertain its liability to overflow. It is his duty to do so. If he fails to do so, the Chancellor will not relieve him. *Wright* vs *Todd's heirs*, 459.
2. A delay of seven or eight years after taking possession of and enjoying land purchased before bringing suit for a recission of the contract, is a strong circumstance against the claim for recission for alleged fraud in the qualities of the land. *Ibid.*
3. The title of vendors derived by purchase under a decree for sale of infants' estate descended—sale and conveyance by a commissioner, approved by the Chancellor—price received by the infants arriving at full age, acquiesced in for near twenty-five years: Held that the vendee was bound to accept such title. Though one of the owners of the land sold, who held about 143d part, was and still is a *feme covert*. For her part, a deduction from the price was proper, and recission refused. *Nelson's heirs* vs *Lee*, 502.
4. The general power of the Legislature to authorize the sale of infants' real estate, has (if ever doubtful) been too long practiced and acquiesced in in Kentucky to be now questioned. *Ibid*, 506.

See *Infants' Real Estate.*

RES ADJUDICATA.

1. A deed once held to be valid by the Court of Appeals cannot, upon a return of the case to the Court of Appeals, be again adjudicated upon, though distinct objections be urged against it. *Ford, &c.* vs *Gregory's heirs*, 183.

REVERSION.

1. A revresion remaining in executors, or trustees having the power of executors, after the expiration of a dower interest, is liable to sale under execution against the executors. *Myers* vs *Daviess*, 397.
2. That the trustees have the power of appointment after the expiration of the dower estate, conferred on them by the will of the testator, will not prevent their sale if the power has not been exercised. *Ibid*, 398.

REVIVOR.

1. The filing a bill of revivor is matter of right, and no leave of the Court is necessary to file it. Nor is it necessary to notice the filing on the record. *Crook's ex'or* vs *Turpin, &c.* 245.
2. It is matter of right to file a bill of revivor—no leave of Court is necessary to be had. *Crook's ex'or* vs *Turpin, &c.* 245.
3. *Qu*—Is it necessary to notice it on the records. *Ibid.*

ROADS.

1. No public road can be discontinued by the County Court unless a majority of all the members of the County Court be present, and a majority of those present concur: (2 *Stat. Law*, 1409.) *Elliott* vs *Treadway*, 24.

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ROADS—*Continued.*

2. When a road had been opened and recognized by the public and county authorities for twenty-five or thirty years, with the knowledge of the owner of the land—Held that the acquiescence of the owner of the land was evidence of its dedication to public use for the purpose of the road, and it was no trespass to remove obstructions placed there by the owner of the land. *Ibid*, 26.

SEALS.

See *Mortgages.*

SET-OFF.

1. Where a horse was purchased for foreign market, which horse was unsound, but the unsoundness not discovered until taken off to market, no return or offer to return was necessary to entitle the purchaser to set-off for the amount of the loss or injury. *Carter* vs *Stennet & Eason*, 254.
2. That the obligor obtained indulgence from the assignee without any contract therefor, is not a waiver of any right to set-off existing before the assignment. *Berry* vs *Stockwell, &c.* 299.
3. Set-off may be plead against the party beneficially interested in the suit. *Bourne* vs *Wooldridge*, 493.
4. A note was given to one of a firm for partnership property, and passed to a creditor of the firm without assignment. Suit by the payee for the use of the firm creditor—set-off plead of notes given to the defendant before the execution of the note sued on. Replication that the note sued on was given for partnership property bought by defendant and the note given by defendant through fraud or mistake to one of the firm—Held that the replication was a valid answer to the plea on demurrer, and should have been allowed. *Ibid.*

SETTLEMENTS.

1. A husband not indebted may make a settlement upon his wife, if not done with the intention of going in debt, and be but a reasonable proportion of his estate. *Haskell* vs *Bakewell*, 209.

SHERIFFS.

1. A Sheriff sued for a trespass who attempts to justify, must show that he was Sheriff. *Calvert, &c.* vs *Stone*, 153.
2. *Qu*—Can a Sheriff, in Kentucky, constitute a special deputy to levy a *fire facias?* If so, he can give no greater power than he himself has. He cannot break the locks of an outer door of a dwelling house to levy a *fi. fa. Ibid*, 153.
3. Process directed to the Sheriff may be executed by the deputy in the name of the principal, in whole or in part. The principal may sell land after the deputy has levied, or convey where the deputy has sold. The office of Sheriff is one. *Young* vs *Smith, &c.* 296.

SHERIFF'S SALE OF LAND.

1. Though a Sheriff's deed for land sold under execution does not show that in all respects he proceeded according to the 28th and 29th sections of the execution law in conducting the sale, (*Stat. Law*, 630,) yet if the contrary does not clearly appear, the Sheriff's deed should not be excluded when offered to show title. *Young* vs *Smith, &c.* 294.

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SHERIFF'S SALE OF LAND—*Continued.*

2. A deed made in the name of the principal Sheriff by the deputy who made the levy and sale, is valid to pass title. The office of Sheriff is one. *Ibid*, 295.
See *Land Sales.*

SLANDER.

1. "She put poison in a barrel of drinking water to poison me"—,,he had said that she had put poison in a barrel of drinking water to kill him, and he would say it again"—Held actionable words. *Mills and wife* vs *Wimp*, 417.

SLAVES.

1. The owner of a ferry on the Ohio is not liable to the owner of a slave escaping by the ferry without his knowledge or consent: (8 *Dana*, 158; 1 *B. Mon.* 292.) *Brasher* vs *Kennedy*, 28.
2. The statute of Kentucky giving a reward to the taker up of runaway slaves, is not unconstitutional; and the taker up of a slave in Indiana, who brings him to Kentucky, where he escapes again, may legally demand him of a second taker up, to be delivered to the owner, and is entitled to the reward upon such delivery. *Elliott* vs *Gibson*, 440.
See *Ferries.*

SPECIFIC PERFORMANCES.

1. The Chancellor has a discretion in decreeing the specific performance of contracts, and will not decree a hard and unconscious bargain, extorted from one of feeble mind and in distressed circumstances, but rescind at his request. *Esham and wife* vs *Lamar*, 45.
2. A decree for a specific performance of a contract for land, cannot be decreed upon the bill of the executor or administrator—the heirs must unite. *Haggin's heirs* vs *Gilman's ex'or*, 213.
See *Infants' Real Estate.*

STATUTES.

1. In the construction of statutes, the intent of the Legislature should be sought, in doing which, the Court should have respect to the context, subject matter, or causes and consequences of the enactment, and not be confined to the letter. (4 *Litt.* 377.) *Phillips* vs *Pope's heirs*, 172.

STATUTES CITED OR CONSTRUED IN THIS VOLUME.

1800, Concerning the descent of Slaves, page 2.
1838, Concerning Sureties, page 10 and 199.
1838 and 1796, Concerning Limitation, page 15, 16, 62, and 313.
1831 and 1818, Concerning Roads, page 24.
1831 and 1820, Concerning Ferries, page 28.
1843 and 1845, Exempting property from sale, &c. page 31.
1819, Authorising separate actions against heirs or devisees, page 75.
1838, Concerning fraudulent sales, &c. page 86.
1828, Concerning Replevy Bonds, page 90.
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1795, Respecting copies of writings which are made evidence, page 116.
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1818, Concerning prosecutors, page 126.
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1796, Authorizing actions against the representatives of deceased joint obligors, page 217.
1812, Concerning sealed instruments, page 286.
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" Same concerning wills, page 329.
1831, Concerning County Attornies, page 305.
1824, Concerning Champerty, page 338.
1796 and 1798 Injunction Bonds, page 353.
1815, Establishing Covington, page 387.
1785, 1794, and 1831, Conveyancing, page 405.
1846, For protecting the rights of married women, page 411.
1811, Division of Lands, page 420.
1820, 1842, and 1796, Wills, and proof of Foreign Wills, &c. 426.
1838, Fugitive Slaves, page 438-9.

SUBSTITUTION.

1. Heirs, against whom a judgment was recovered, in conjunction with the administrator, paid off the judgment:—Held that they might rightfully be substituted to the right which the creditor had, to file a bill against the administrator for discovery of assets, and be reimbursed the amount paid upon the judgment, in case it was found that the administrator had been guilty of a mal-administration of the assets. *Place, &c.* vs *Oldham's adm'r.* 402.
2. But in such case, where the administrator has paid a bond debt, and a debt which he paid as surety for the intestate—Held that the administrator should be permitted to retain, *pro rata*, for the amount paid on the bond, and due to him for money paid as surety for the intestate, paying to the heirs interest on the part coming to them. *Ibid*, 404.

SURETIES.

1. May proceed in chancery to be reimbursed money paid for his principal—so may the assignee of the surety, if the surety be a party. *Hite* vs *Campbell*, 80.
2. The statute of limitations cannot be relied upon by a surety in chancery, after a judgment at law against him. *Willis* vs *Caldwell*, 199.
3. Where the principal in an obligation was discharged from liability on the ground of his infancy, the failure to sue out an execution on the judgment for more than one year, is no discharge of the surety. *Short* vs *Bryant*, 10.
4. A surety signed a note and placed it in the possession of the principal, under his promise to procure another particular individual to sign also as joint surety. The principal passed the note to payee, who was ignorant of the promise of the principal to procure the additional security—Held that the surety was bound to the payee or his assignee, notwithstanding the fraud of the principal. *Smith* vs *Moberly, &c.* 268.

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SURETIES—*Continued.*

5. In such case the surety makes the principal his agent to deliver the note, and if there be any condition unknown to the payee, he will not be affected by it. *Ibid*, 269.
6. The law relating to bills of exchange is generally applicable to promissory notes, (2 *J. J. Marsh.* 460,) and the negligent drawer should suffer rather than the innocent holder. A note signed and sent out in blank may bind the person so signing for the amount which may be inserted in the note, though it be in violation of a parol condition. *Ibid*, 270.
7. A surety executing a note, which is by law assignable, cannot limit its use to the payee, or restrain him from assigning it: (5 *Wendell*, 66.) *Ibid*, 271.

See *Limitation*, 1.

TENANT FOR LIFE.

1. A tenant for life is entitled, unless there be some restriction to the contrary, to the profits of the estate for the term. That he, whilst a minor, was by the will restricted in the extent of the expenditure of the profits, does not curtail his right to that unexpended on arriving at full age. *Young and wife* vs *Miles' ex'ors*, 289.
2. Though a life estate be vested in trustees, the *cestui que trust* is, in equity, the owner and entitled to the possession of such property as will give profit from its use, unless such possession interfere with the design of the trust. *Ibid*, 289.

TENDER.

1. When a horse was purchased to be taken to foreign market and sold, and was so taken and sold, the purchaser did not lose his right in a court of equity to a set-off against the price, to the extent of any injury from the unsoundness of the horse, in consequence of a failure to return the horse, the purchaser being insolvent. *Carter* vs *Stennet & Eason*, 254.

TRESPASS.

1. Cannot be maintained upon a merely *legal* seizin, but there must be an actual possession. *Neely, &c.* vs *Butler, &c.* 50.
2. It is not a trespass for a party who has a writ of replevin in the hands of an officer in his behalf, to enter with the officer to regain the possession of property, especially where not forbidden and the entry was peacable. *Allen, &c.* vs *Feland*, 308.
3. A plaintiff in replevin is not liable as a trespasser who receives the property from the Sheriff, though the Sheriff may fail to return the writ, and the suit be dismissed after the property is received from the Sheriff, unless he assented to or advised the act of the Sheriff in failing to make the proper return of the process. *Allen, &c.* vs *Feland*, 310.
4. To render a party liable as a trespasser who was not present when it was committed, he must knowingly and intentionally have encouraged it in a way calculated to cause it to be done. *Byrd* vs *Lynn*, 423.
5. A sued in trespass for the use of B—the Court cannot on demurrer say that there is any thing upon the face of the declaration showing that A may not maintain the suit—the fact of the suit being for the benefit of another, if plead and proved, would not defeat the action. *Blankensphip* vs *Cressillas*, 436.

TROVER.

See *Widows.*

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TRUSTS AND TRUSTEES.

1. No trust results in favor of a grantor who conveys his property fraudulently to avoid the payment of his debts. The Chancellor will not interfere in such case, but leave the parties where they have placed themselves. *Ford's Ex'or. &c. vs Lewis*, 127.

2. The Chancellor has the power, and will control a trustee in the exercise of his trust duties, and see that the purposes of the trust are carried into effect. *Berry vs Hamilton*, 135.

3. Trusts are peculiarly cognizable before the Chancellor—so where widow of the testator was created trustee for a particular purpose, during which she was to control certain property of the testator, and then surrender it to be divided amongst the heirs—Held that it was with the Chancellor to decide whether the trust had been performed, and the property delivered up—not a Court of law. *O'Neal and wife vs Beall*, 274-5.

4. Though a life estate be vested in trustees, the *cestui que trust* is the owner in equity, and entitled to the possession of such property as will give profit from its use, unless such possession interfere with the design of the trust. *Young and wife vs Miles' ex'ors.* 289.

5. Where the use or profits of money and stock is devised in trust to be under the control of trustees, they have the right to the possession thereof, paying the profits to the *cestui que trust. Ibid*, 290.

6. A father may convey property to his son-in-law, to be held in trust for the benefit of his daughter, the wife of the trustee, upon such terms as he may choose. That it is to be paid to her in case of separation or divorce, does not render it an invalid conveyance. *Waring's ex'or. vs Waring*, 332.

7. In such case, when the husband dies, the right of the widow, the *cestui que trust* is complete. *Ibid*, 333.

8. Where a testator appoints persons to execute his will, though he style them *trustees*, if the powers conferred be such as an executor usually possesses, it amounts to a constructive appointment of them as executors: (*Williams on Executors*, 123,) *Myers vs Davies*, 396.

9. A trustee who acts in good faith, and with due diligence, is not in general personally responsible; though if a duty be imposed, and he violate that duty, he is responsible, if loss ensue. *Cross vs Petree*, 413.

10. A trustee to whom a note was assigned in trust, failed to sue to the first Court after the note fell due, whereby the assignor was released and the debt lost: Held that he was personally responsible to the *cestui que trust. Ibid.*

11. That the note was given to one as executor, and assigned to pay the debt of the executor, will not excuse the want of diligence. *Ibid*, 414.

12. A trustee who fails to avail himself of all the securities which he has in his power, to secure a debt in his hands to collect, may be held personally responsible for the debt. *Ibid*, 416.

13. A trustee to whom a note was assigned in trust, held responsible for not bringing suit to the first Court, whereby recourse upon the assignor was lost. *Ibid*, 413.

See *Collateral Security.*

USURY.

1. If a note be prepared for the purpose of borrowing money and that fact be known to the lender of the money, or under such circumstances as to justify

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USURY—*Continued.*

the conclusion that the lender of the money knew that the maker of the note acted in the matter with a view to enable payee to raise money upon the note by disposing of it at a discount greater than the legal interest for the time it has to run, the transaction should be regarded as usurious, and an attempt to evade the statute. *Richardson* vs *Scobie*, 12.

2. Where a debtor has paid usury his creditor cannot recover it without his consent, but they may purge all usury from unpaid debts where the funds are insufficient to pay the debts, though the usury be secured by mortgage. *Lee, &c.* vs *Fallowes, &c.* 117.

VALUATIONS.

1. It is not necessary to value lands sold under decrees in chancery as in cases of sales under execution: (1 *Dana*, 185.) *Haggin's heirs* vs *Gilman's ex'or*, 214.

VARIANCE.

See *Practice.*

VENDOR AND VENDEE.

1. A vendor without title, afterwards acquiring title, it will enure to the benefit of his vendee; but the heir of such vendor, acquiring title, cannot be compelled to surrender it to the vendee of the ancestor, nor to answer in damages for failing to convey unless he received assets from the ancestor. *Upshaw* vs *McBride, &c.* 103.

WIDOWS.

1. The statute of 1843, (*Session Acts*, 17,) reserves to the widow and children of a person dying *with or without* will, the same property which is exempted from sale under execution. *Graves* vs *Graves*, 31.
2. The act of 1845 does not repeal the act of 1843 reserving to widows of persons dying with or without will, the same property which by that act is reserved and exempted from sale under execution. *Ibid*, 32. Whether the provisions of a will unrenounced might not preclude the widow from the benefit of the provisions of the statute, not decided. *Ibid*, 33.
3. Trover may be maintained by the widow for the exempted property against the executor who sells it without any demands. *Ibid*, 33.

WILLS.

1. As to personal property and slaves, a will is to be construed as speaking from the death of the testator; but as to real estate from the date of the will—the statute of 1800 (2 *Stat. Law*, 1546,) does not change this rule of construction in respect to slaves: (7 *J. J. Marsh.* 58.) *Marshall's heirs* vs *Porter*, 2.
2. A devise of all the testator's lands, is to be construed as embracing only such lands as the testator owned at the publication of his will, unless a different intention be clearly expressed or necessarily implied. *Ibid*, 3.
3. "I lend the use of negroes K. and G. to my daughter C. during her natural life, and at her death to be equally divided between the heirs lawfully begotten of her body, and for the want of such heirs to fall to my daughter F."—Held that upon the death of the daughter C. the slaves K. and G. belonged to her children. *Prescott* vs *Prescott's heirs*, 57.
4. A will to pass lands, must be attested by two witnesses. *Argu.* *Berry* vs *Hamilton*, 136.

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WILLS—*Continued.*

5. A witness to a will in which it was provided that the administrator of the father of the testatrix, should be exonerated from any *loss* as administrator, not however exonerating him from any legal liability—Held that the surety of the administrator in his bond, as such, was not by such provision in the will rendered incompetent to prove the will. *Ibid*, 137.

6. The term "heirs of the body," when used in wills, is very generally understood to be used as words of purchase, and to convey an interest to children, and not used as words of limitation. The same words are so taken when it clearly appears to be the *intention* to give a present interest to children. Such was the construction given to such words by the English Courts, especially when used with reference to a chattel. *Jarvis, Trabue & Curd* vs *Quigly*, 106.

7. The intention of the grantor is to have its weight in the construction of deeds. *Ibid*, 107.

8. In the construction of wills the intention of the testator must govern unless it be against law. If there be repugnant clauses, the latter must prevail. Words or even clauses may be transposed where such transposition is necessary to make sense of the provisions of the will. Every clause should be so construed as to give effect thereto if practicable without contradiction. *Hunt* vs *Johnson, &c.* 344.

9. A case of a transposition of a clause. *Ibid*, 346.

10. A testator may, as between the devisee and heir at law, charge the personal estate with and exonerate the real estate for the payment of debts. Formerly it was held necessary that such intention should be expressly declared—latterly it has been held, that though there be not express words of exoneration, yet if the intention appear plainly upon the whole will that intention should be carried into effect: (2 *Williams on Executors*, 1047–54; *Ram. on Assets, chap.* 3, *sec.* 6; *chap.* 6, *sec.* 2, 8 *vol. Law Lib.*) *Marsh's heies* vs *Marsh's devisees*, 360–61.

11. The fact that a will makes no disposition of the personal estate, is a strong circumstance against the inference that it was the intention of the testator to exonerate it from the payment of debts, though it may not be conclusive. *Ibid*, 363.

12. So the withdrawal of the greater part of the real estate from the payment of debts and legacies, is a circumstances against the conclusion that the real estate is to be charged with debts and legacies. *Ibid*, 364.

13. The amount of debts against a testator, and other facts, may be considered in determining the intention of the testator in regard to exonerating the personal and charging the real estate with the payment of debts and legacies. *Ibid*, 365.

14. Wills made in other States and there duly proved and recorded in Kentucky, will pass lands in Kentucky; but if such will be proved by one witness, whose testimony is given in the record, and who says nothing about the presence of the other witness whose name appears to the will, or of his attestation in his presence—Held that such proof was insufficient to pass land in Kentucky. *Cornelison* vs *Browning*, 427–8.

15. Proof of a will before a competent tribunal is binding upon all the world whilst it remains in force, subject only to reversal upon appeal, writ of error, or bill in chancery, under the statute of 1797. *Tibbatts, &c.* vs *Berry, &c.* 474.

16. A writ of error may be prosecuted from the Circuit to the County Court by any person interested in the provisions of the will, which brings up the whole question of will or no will, and no second writ of error lies by another on the same

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WILLS.—*Continued.*

side. If a right be alleged to sue out the writ, the Court will look into the right. It is proper for the Court to see that all parties in interest should be before the Court. *Ibid*, 477.

See *Emancipation.*

WITNESS.

1. A surety of an administrator in his bond, held not to be rendered incompetent to prove the will, because the will provided that the administrator was to be protected from loss by, or on account of the manner in which he had managed the estate of the father of the testatrix. *Berry* vs *Hamilton*, 137.
2. A remote contingent interest in the provisions of a will, will not disqualify a witness from proving the will. Proof of disqualification rests on the objector. *Ibid*, 138.
3. The deposition of a witness taken while he is competent, may be read; though he is competent at the trial and has become interested by the death of one of the parties to the suit. *Smithpeters* vs *Griffin's adm'r*, 259.
4. Where two creditors attached property of a debtor, the complainant in the second, is a competent witness for the first. *Beall* vs *Barclay, &c.* 262.
5. The statements of a vendor after he has parted with his title, are not evidence against his vendee. *Ibid.*

WORDS.

See *Slander.*

WRIT OF ERROR.

1. May be prosecuted in cases of the Commonwealth where there is a conviction, the punishment being fine or fine and imprisonment. *Haydon* vs *Commonwealth*, 125.
2. Where there appears a defect of parties upon the face of the record, the Court may quash or dismiss unless it be amended. *Tibbatts, &c.* vs *Berry, &c.* 479.
3. The statute of 1842, allowing writs of error from the County to the Circuit Court, gives the writ to any person *interested* in the question of probate, but does not define the *interest*. *Ibid.*
4. Trustees appointed by the will to execute important trusts, have such *interest* as will authorize them to prosecute a writ of error to a judgment rejecting the will. *Ibid.* So have tenants in remainder. *Ibid*, 486-7-8-9.

WRIT OF RIGHT.

1. Cannot be maintained upon a mere *legal* seizen. *Neely, &c.* vs *Butler, &c.* 50.

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